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CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

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HJ 6624
A35
v. 82

UNITED STATES CUSTOMS COURT

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*Retired June 20, 1970

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(C.D. 4782)

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC., LIBBEY-OWENS-FORD COMPANY, AND C E GLASS *v.* UNITED STATES

Float glass—Countervailing duties

Plaintiffs, domestic manufacturers and wholesalers of float glass, have petitioned the Secretary of the Treasury for imposition of countervailing duties on such merchandise produced in the Federal Republic of Germany pursuant to section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974. Following the denial of their administrative petition, plaintiffs instituted action under section 516(d) of the Tariff Act of 1930, as amended by section 321(f)(1) of the Trade Act of 1974.

Plaintiffs allege low-interest loans, investment subsidies in the form of cash grants and tax credits given to the producers of float glass in West Germany are subject to countervailing duties. Defendant contends these bounties or grants are not countervailable, since they did not tend to distort international trade.

Held, plaintiffs have failed to overcome the presumption of correctness attaching to the negative finding by the Secretary of the Treasury.

Court No. 76-3-00667

[Judgment for defendant.]

(Decided January 5, 1979)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Joseph I. Liebman*, *John J. Mahon* and *Sidney N. Weiss*, trial attorneys), for the defendant.

FORD, Judge: This action involves cross-motions for summary judgment filed pursuant to rules 4.12 and 8.2 of the rules of this court. Plaintiffs, domestic manufacturers and wholesalers of float

glass, allege certain bounties or grants were being paid or bestowed upon the manufacture of float glass in the Federal Republic of Germany. Plaintiffs urge such importations of float glass are, therefore, subject to assessment of countervailing duties as provided for in section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974, 88 Stat. 1978, 2049. Defendant contends plaintiffs have failed to establish that the alleged bounties or grants possess the requisite effect upon international trade which would require imposition of countervailing duties.

The essential facts relating to assistance given the two glass manufacturers in the Federal Republic of Germany are not in dispute, nor is the chronology leading to the final determination of the Secretary of the Treasury (Secretary) in finding that such assistance did not amount to a bounty or grant within the meaning of section 303(a), as amended, supra.

The statements of material facts filed by the parties pursuant to rule 8.2(b) of the rules of this court, and upon which the parties contend there is no triable issue, established that plaintiffs are domestic manufacturers and wholesalers of float glass. On June 3, 1974, plaintiffs filed a petition with the Commissioner of Customs alleging bounties or grants were being paid to manufacturers of float glass in the Federal Republic of Germany. A "Notice of Receipt of Countervailing Duty Petition" was published in the Federal Register, 40 F.R. 2718, on January 15, 1975. As a result of the petition, an administrative investigation was conducted by the Department of Treasury with the assistance of the U.S. Customs Service pursuant to section 303(a), supra, and 19 CFR 159.47(c) (1975) in order to make a preliminary and final determination. On June 30, 1975, a "Notice of Preliminary Countervailing Duty Determination" was published in the Federal Register, 40 F.R. 27499, as follows:

> On the basis of an investigation conducted pursuant to §159.47(c) Customs Regulations (19 CFR 159.47(c)), it has tentatively been determined that benefits have been received under various West German Federal and State Government regional development programs. Government aid to these regional areas consists of investment grant subsidies and bonuses for capital expenditures relating to construction or expansion of plants, low interest loans, and special railway tariff rates.
>
> Benefits derived from programs such as those which are the subject of this investigation can, in some circumstances, constitute bounties or grants within the meaning of the law. Since the information thus far made available concerning these programs has not been sufficient to permit a thorough analysis of their nature and effect, it has been determined preliminarily that imports of float glass from West Germany benefit from the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of the [sic] section 303 of the Tariff Act of

1930, as amended, by reason of the regional incentive payments mentioned above.

An amendment to "Notice of Preliminary Countervailing Duty Determination" was published in the Federal Register, 40 F.R. 34423 on August 15, 1975, extending the time within which the public could make submissions. On January 7, 1976, a "Notice of Final Countervailing Duty Determination" was published in the Federal Register, 41 F.R. 1300, and provides:

> Information has now been received that permits a more complete analysis of the alleged bounties and grants. Under various regional development programs administered by the Federal and State Governments, low interest loans and investment subsidies in the form of cash grants and tax credits have been given to producers of float glass. The German Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions. Inasmuch as the recipient glass producers sell a preponderance of their production in the West German home market (not less than 80 percent and up to 99 percent), the level of exports to the United States is a small percentage of the amount exported, and the amount of assistance provided by the regional incentive programs is less than 2 percent of the value of float glass produced, these benefits are not regarded as bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303). All other allegations alleged in the petition are found not to be applicable to the manufacturer, producer or exporter.
>
> Accordingly, for the reasons stated above, it is hereby determined that no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacture, production, or exportation of float glass from West Germany.

On January 28, 1976, plaintiffs, pursuant to section 516(d) of the Tariff Act of 1930, as amended by section 321(f)(1), filed a timely notice of their desire to contest the negative countervailing duty determination by the Secretary. The Secretary then caused publication of plaintiffs' notice in the Federal Register of March 10, 1976, 41 F.R. 10236 (1976). Plaintiffs, on March 15, 1976, commenced action by the filing of a summons with this court.

The facts relating to the two producers of float glass in the Federal Republic of Germany and the assistance given by the federal and state governments in Germany establish that Vereinigte Glaswerke GMBH (Vereinigte) and Flchglas/Delog/Detal (Flachglas) are the two manufactures of float glaas in West Germany. In January 1971 Vereinige completed construction of a float glass facility at Herzogenrath, West Germany, which is in the state of North Rhine-Westphalia, and Flachglas completed construction of its facility in Gladbeck, which is also

in the state of North Rhine-Westphalia in 1973. The state of North Rhine-Westphalia was in an area qualifying for certain federal and state regional development assistance programs. Section 32 of the Coal Mining Adjustment Law of Germany permits eligible firms to apply for an investment premium of 10 percent of the production cost for plants established between April 30, 1967, and December 31, 1971, or for plants whose construction had been started before January 1, 1973. This investment premium was in the form of a tax credit which could have been utilized to the extent that the deduction exceeded the tax payable in the year of construction. However, it could have been carried forward against such taxes payable for the succeeding four fiscal years after which any remaining tax credits were lost. These tax credits amounted to 10 percent of the depreciable assets as defined by law and were granted to Vereinigte in 1973 and retroactively applied to the 1970 and 1971 corporate taxes. Flachglas also received a credit of 10 percent of the depreciable assets as defined by law.

In addition to the above, the state of North Rhine-Westphalia provided taxable assistance from funds of the federal and state governments for the improvement of regional economic structures in economically weak regions. Vereinigte, on January 30, 1970, was provided with investment assistance which was utilized to partially finance the cost of its Herzogenrath facility. Flachglas also received said assistance in December 1972 and December 1973, which was used to partially finance the cost of its Gladbeck facility.

Under the European recovery program eligible enterprises could obtain loans at the interest rate of 6 percent per annum for a period from July 21, 1967, to the end of 1971. Vereinigte received a 12-year loan at the rate of 6 percent in 1970, the first 2 years free of redemption. The available commercial interest rate for similar issues was 8.5 percent per annum. Flachglas also received a 10-year loan at 6 percent interest in 1972, the first 18 months being free of redemption.

In 1970, the Federal Department of Labor of West Germany granted Vereinigte a 12-year loan with interest payable at the rate of 4 percent per annum, with the first 2 years free of redemption.

Vereinigte and Flachglas sold a preponderance of their production in the West German home market (not less than 80 percent and up to 99 percent). The amount of assistance provided by the regional incentive programs was less than 2 percent of the value of the float glass produced.

As indicated infra, float glass may be classified under nine item numbers of the Tariff Schedules of the United States. The "Summaries of Trade and Tariff Information," schedule 5, volume 5, TC publication 365 (1971), contain the following pertinent information:

> Ordinary glass is defined as flat glass other than special or colored glass and is usually clear or nearly clear glass whose

coloring or opacifying content is so low that light transmittance is virtually unhindered.

Plate glass and float glass are types of flat glass that have plane and parallel surfaces and show no distortion when objects are viewed through them. The two types of glass are virtually indistinguishable, differing principally in method of manufacture and cost of production. They are used inter-changeably in most applications although float glass is not produced as yet in all the thicknesses in which plate glass is made.

Plate glass is manufactured principally by using the rolled glass process that turns out a continuous ribbon of flat glass of the desired thickness and width. The sheet of glass, after passing through an annealing lehr to remove internal stresses, is cut to standard sizes before being subjected to grinding and polishing operations. In the finishing process, the surfaces of the plate glass are ground by machine to a very smooth flat surface, which is then polished by buffing. The plate glass may be ground or polished on one side at a time or on both sides simultaneously. In the process of grinding and polishing, the plate glass acquires perfectly plane and parallel surfaces.

Float glass is a relatively new type of flat glass [1] (available commercially since 1959) which has virtually parallel surfaces similar to those of plate glass. The parallel surfaces of float glass, however, are achieved by floating the molten glass over molten metal rather than by grinding and polishing as is done with plate glass. Float glass is less costly to produce than plate glass principally because the float process does not require grinding and polishing operations.

* * * * * * *

Nearly all of the plate and float glass shipped by U.S. producers has consisted of glass ranging in thickness from one-eighth inch to one-fourth inch inclusive. In terms of square feet, considerably more than half of both the plate glass and the float glass shipped by U.S. producers in 1968 was one-eighth inch glass. * * *

"U.S. Industrial Outlook 1978" published by the United States Department of Commerce under the heading "Flat Glass" (p. 23) indicates the replacement of plate glass by float glass and makes the following statement:

> The major products of the industry are float glass, tempered glass, and laminated glass. Tempered and laminated glasses are float glass that has received additional processing. Plate and sheet glass are made in small quantities, and have been replaced for all practical purposes by float glass. * * * [See also "U.S. Industrial Outlook 1977."]

It is further noted that "Modern Glass Practice" by Samuel R. Scholes, Ph.D. (seventh revised ed. 1975), page 240, states float glass "is replacing conventional plate glass because of the great economy of its manufacture."

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[1] The float-glass process is patented, and U.S. producers of float glass are licensed by the British firm that invented the process.

The pertinent statutory provisions herein provide as follows:

Section 303(a), Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974, 88 Stat. 1978, 2049–50:

> (a) LEVY OF COUNTERVAILING DUTIES.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.
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> * * * * * * *
>
> (5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.
>
> * * * * * * *

Section 516 (d), Tariff Act of 1930, as amended by section 321(f)(1) of the Trade Act of 1974, 88 Stat. 1978, 2048-49:

> (d) Within 30 days after a determination by the Secretary—
>
> (1) under section 201 of the Antidumping Act, 1921 (19 U.S.C. 160), that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or
>
> (2) under section 303 of this Act that a bounty or grant is not being paid or bestowed,
>
> an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.
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> * * * * * * *
>
> (g) If the cause of the action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse

> for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

Based upon the foregoing, it would appear that bounties or grants were bestowed on the production of float glass in the Federal Republic of Germany. Accordingly, the threshold issue for determination is whether the importations are subject to countervailing duties under the statute.

The statutory provision of section 303(a)(1) requiring the assessment of such duties in using the language "there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant" is couched in mandatory language. However, if Congress intended that all assistance given by foreign governments are bounties or grants, there would be no reason to have given the Secretary authority to make a determination of whether a bounty or a grant had been bestowed. This is clearly evidenced by the following language utilized in *United States* (*Ralph Valls, Party-in-Interest*) v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), cert. denied, 404 U.S. 1005 (1971):

> The Congress is, of course, well aware of these problems, and it would seem it elects to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries which have taken reasonable action, action our own government takes or counsels. Countervailing duties are strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded by the court as unethical. In what has been hitherto the regular practice of the Treasury Department making the decision to assess countervailing duties, the decisions, not necessarily partisan political, but political in a broad sense, legislative, or of a policy nature, can be made by an agency that is equipped and staffed to make them. There can be no doubt that the Secretary is under a legal duty to assess countervailing duties if he sees a bounty or grant being paid, but we think he does and must exercise some discretion in defining what acts of foreign governments confer bounties or grants, when the case is doubtful. * * *

It is the function of the courts in interpreting statutory provisions to carry out the intent of Congress in enacting the law. In order to ascertain intent courts may resort to legislative history. *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976); *A. N. Deringer, Inc.* v. *United States*, 63 CCPA 37, C.A.D. 1161 (1975). Chief Judge Markey, speaking for the court in *United States* v.

Zenith Radio Corporation, 64 CCPA 130, C.A.D. 1195 (1977), made the following appropriate comment:

> The intent of Congress, as expressed in § 303 itself, is not difficult to fathom. As the predecessor of this court, in *Nicholas & Co.* v. *United States*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916) and the Supreme Court in *Nicholas*, 249 U.S. at 39, indicated the words "bounty" and "grant" are broad but not ambiguous. "Net amount" necessarily means that countervailing duties should equate to the true bounty or grant actually conferred. Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or nonexistence of a bounty or a grant, is clear from the statute itself, and from the Congressional refusal to define the word "bounty" * * *.
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> * * * * * * *
>
> Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead*, supra note 11: "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres," 58 CCPA at 137, 440 F. 2d at 1030, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as "countervailing" duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage. Presumably enacting and reenacting § 303 in this broad light, illuminative of the statute's role in the world, Congress in its wisdom has simply refrained from calling all the countervailing duty plays in advance.[15]

In *Zenith Radio Corporation* v. *United States*, 437 U.S. 443 (1978), the Supreme Court, in considering what constitutes a bounty or a

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[15] Congress' most recent reference to the international implications of export incentives and countervailing duties, and to the role of the Executive in connection herewith, appears in § 331(a), Trade Act of 1974, 19 USC 1303(d)(1) (Supp. V. 1975):

> It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

To facilitate negotiations, Congress, while continuing to refrain from a definition of "bounty" or "grant," granted authority to the Secretary to suspend during the four years beginning January 3, 1975, and under certain conditions, the imposition of countervailing duties, after having determined that a bounty or grant is in fact being bestowed, 19 USC 1303(d)(2), and to reinstate such duties, 19 USC 1303(d)(3). In § 1303(e), Congress provided for reports to it of actions under § 1303(d)(2), and for the undoing thereof upon a resolution of disapproval by the Senate or the House.

grant, referred to Senate Report No. 93–1298, page 183 (1974), which so far as is pertinent herein, made the following comment:

> The Committee recognizes that the issues involved in applying the countervailing duty law are complex, and that, internationally, there is the lack of any satisfactory agreement on what constitutes a fair, as opposed to an "unfair," subsidy. In the long run, United States interests will be best served by an international agreement to eliminate subsidies which *distort world trade patterns and discriminate against United States sales both at home and abroad.* Central to the forthcoming mutilateral negotiations should be the establishment of acceptable international rules governing the use of subsidies. This is particularly important because of the strong possibility that oil importing nations will be tempted to subsidize their manufactured goods exports in order to pay for their "oil deficits." [Italic supplied.]

With respect to unfair competitive advantage, the Supreme Court in *Zenith* stated:

> * * * This purpose is relatively clear from the face of the statute and is confirmed by the congressional debates: the countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments. See, *e.g.*, 30 Cong. Rec. at 1674 (remarks of Sen. Allison), 2205 (Sen. Caffery), 2225 (Sen. Lindsay). The Treasury Department was well-positioned to establish rules of decision that would accurately carry out this purpose, particularly since it had contributed the very figures relied upon by Congress in enacting the statute. See *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969).

In view of the foregoing, it is apparent Congress was aware of the complexities involved not only in determining or defining a bounty or grant, but whether such bounty or grant is fair or unfair.

The test enunciated in *Downs* v. *United States*, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919) is whether, as a result of governmental programs, exportation of the merchandise so produced is encouraged. The fact that governmental assistance was given to aid depressed areas in the Federal Republic of Germany is therefore of no consequence.

Whether as a result of bounties or grants, exportation was encouraged to the extent it would distort foreign trade, it is to be noted in the statement of material facts filed pursuant to rule 8.2(b) of the rules of this court, and particularly the "Notice of Final Countervailing Duty Determination," that no less than 80 percent and up to 99 percent of the production was sold in West Germany. The statement further indicates that the assistence was less than 2 percent of the value of float glass produced in the Federal Republic of Germany. While up to 20 percent of the production and 2 percent of the value may be more than *de minimus*, the bounties do not appear to have induced the sale

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of such merchandise in such quantities or value as would tend to distort international trade. The Secretary has in effect made such a finding in holding countervailing duties were not applicable herein. Such a finding is presumptively correct. Compatible with the finding by the Secretary that governmental assistance given the float glass manuufacturers in West Germany did not distort international trade, the court notes the U.S. Department of Commerce, Bureau of the Census figures [1] indicate that exports of float glass by the United States from 1972 to 1975 rose from 59 million square feet to 103 million square feet. The court has utilized the years 1972 to 1975 in view of the fact that plaintiffs in their pretrial discovery proceedings sought, by way of written interrogatories, certain information concerning production, etc. for these years. The discovery was the subject of a motion to compel by plaintiffs and a motion for a protective order by defendant, both of which were granted as to certain information. Of significant interest are the figures from the same source which establish that exports of float glass to West Germany increased from 409,000 square feet in 1972 to 979,000 square feet in 1975. These substantially increased sales in the home market of a country which provided bounties or grants are indicative that there has been no discrimination in sales made by the United States to West Germany. It follows that United States sales were therefore competitive in the home markets of West Germany. What better proof can be adduced that float glass produced in the Federal Republic of Germany under a bounty or grant system did not tend to distort international trade or discriminate against United States sales for home consumption or export.

The import statistics of the U.S. Department of Commerce, Bureau of the Census,[2] are arranged according to the provisions of the Tariff Schedules of the United States since the information is obtained from the entries of merchandise utilizing the TSUS number plus the statistical suffix. There are nine provisions [3] under which float glass, plate glass, and colored or special glass may be entered. The court is not privy to the size or type of float glass covered by this action and hence has reviewed the entire nine categories (excluding glass with wire) of possible classification under the Tariff Schedules of the United States. It is to be noted, however, that the 1972 import statistics establish imports from West Germany in all nine categories. While the figures may include categories of glass not intended to be encompassed within this action, the statistical information is never-

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[1] U.S. Bureau of the Census, "U.S. Exports, Schedule B Commodity by Country—Domestic Merchandise," report FT 410: Item No. 664040 for the years 1972-75.

[2] U.S. Bureau of the Census, U.S. Imports for Consumption, TSUSA Commodity by Country of Origin, report FT 246 for the years 1972-75.

[3] Tariff Schedules of the United States, item numbers including statistical suffix: 543.2100, 543.2300, 543.2733, 543.2770, 543.3100, 543.6100, 543.6300, 543.6700, and 543.6900.

theless enlightening. Imports of glass from all countries in these nine item numbers decreased from 72 million square feet in 1972 to 19 million square feet in 1975. Imports in these categories from West Germany fell from 3,900,000 square feet in 1972 to 518,000 square feet in 1975.

According to the U.S. Department of Commerce, Bureau of the Census,[4] the domestic production covering float and plate glass not over one-eighth inch in thickness and over one-eighth inch but not over one-fourth inch in thickness establishes a marked increase. Production rose from 1,424 million square feet in 1972 to 1,920 million square feet in 1975.

The above figures covering exports, imports, and domestic production, while they may not be determinative, are indeed supportive of the Secretary's finding. It is a well established principle of law which needs no citation that courts may take judicial notice of official publications.

Congress in enacting the countervailing duty statute was primarily interested in merchandise produced under a bounty or grant system which was imported into the United States and the possible effect it might have on domestic producers of the merchandise involved in both domestic and foreign sales. Absent are figures involving production, consumption, importation, and exportation of float glass of every producing nation. However, the 1972–75 figures cited supra support a finding that float glass produced in the Federal Republic of Germany did not tend to distort international trade and did not discriminate against the U.S. production and sales, both domestic and foreign.

Based upon the record, plaintiffs have failed to overcome the presumption of correctness attaching to the action of the Secretary.

In view of this finding, the court deems it unnecessary to consider the alternative positions of the parties.

Plaintiffs' motion for summary judgment is, therefore, denied and defendant's cross-motion for summary judgment is granted.

Judgment will be entered accordingly.

(C.D. 4783)

SCHOTT OPTICAL GLASS, INC. *v.* UNITED STATES

Optical glass

Glass merchandise imported from West Germany was classified by customs officials as optical glass under item 540.67 of the tariff schedules and assessed with duty at the rate of 40 percent ad

[4] Current industrial reports MQ-32A for the years 1972–75: Items designated 3211213 and 3211215.

valorem. The importer contended that the merchandise should have been classified as colored or special glass, not ground, polished or processed, under item 542.92 of the tariff schedules with a rate of duty of 0.7 cent per pound plus 2.5 percent ad valorem. The court found that the glass, which was of high quality, capable of performing an optical function, and used in optical instruments, was not shown to have been incorrectly classified by customs officials as optical glass.

EVIDENCE—PRESUMPTION

The classifying official, as a matter of law, is presumed to have found the existence of every fact necessary to support the classification. *W. A. Gleeson* v. *United States*, 58 CCPA 17, 432 F. 2d 1403 (1970); *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966); *F. H. Kaysing* v. *United States*, 49 CCPA 69, C.A.D. 798 (1962). The presumption of correctness pertains not only to the ultimate conclusion of the classifying official, but also to every subsidiary fact necessary to support that conclusion. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 435 F. 2d 1315 (1970).

EVIDENCE—PRESUMPTION AND BURDEN OF PROOF

The presumption of correctness serves the useful purpose of determining the extent of the importer's burden of proof. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 435 F. 2d 1315 (1970).

EVIDENCE—CONCLUSORY STATEMENTS

A statement of a witness, which is based solely on his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value. *Keer Maurer Company* v. *United States*, 46 CCPA 110, C.A.D. 710 (1959); *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1952); *Semon Bache & Co.* v. *United States*, 28 CCPA 166, C.A.D. 140 (1940).

PRESUMPTION AND BURDEN OF PROOF

The presumption of correctness attaching to the customs classification is overcome when plaintiff has discharged the burden of persuading the trier of the fact of the nonexistence of the presumed fact. *Sanji Kobata et al.* v. *United States*, 66 Cust. Ct. 341, 326 F. Supp. 1397 (1971). The plaintiff must bear the ultimate burden of persuasion. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 435 F. 2d 1315 (1970).

COMMON MEANING

The common meaning of a tariff term is a question of law to be decided by the court, and the court may consult dictionaries, scientific authorities and other reliable sources of information. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, 471 F. 2d 1397 (1973); *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, 435 F. 2d 1319 (1971).

Court No. 72-6-01326

Port of New York

[Judgment for defendant.]

(Decided January 17, 1979)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Robert B. Silverman* and *Madeline B. Cohen*, trial attorneys), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of color filter glass imported from West Germany. As shown by the samples in evidence, the merchandise consists of pieces of glass which are 6½ inches square and colored. The colors of the glass include shades of red, green, blue, yellow, and gray.

The colored glass was classified by the customs officials as "other optical glass and synthetic optical crystals; polarizing material," pursuant to item 540.67 of the Tariff Schedules of the United States [TSUS]. Consequently, it was assessed with duty at the rate of 40 percent ad valorem.

Initially, plaintiff contested the classification, and claimed that the colored glass should have been properly classified as "glass * * * ground or polished on one or both surfaces * * * but not further processed * * * [which is] colored or special * * *, measuring not over 1/32 inch in thickness * * *," under item 543.61 of the tariff schedules. Under this claimed tariff item the merchandise would have been dutiable at the rate of 2.8 cents per square foot plus 2 percent ad valorem.

At the trial, however, and without objection from defendant, plaintiff amended its claim and substituted item 542.92, TSUS, for the previously claimed item 543.61. The plaintiff indicated that this change was based solely on whether the imported glass was ground or polished within the meaning of item 542.92, which provides for colored or special glass "in rectangles, not ground, not polished and not otherwise processed * * *," dutiable at 0.7 cent per pound plus 2.5 percent ad valorem.

The question presented, therefore, is whether the imported merchandise was properly classified by the customs officials as optical glass under item 540.67, or whether it should have been classified, as claimed by plaintiff, as colored or special glass under item 542.92.

The following are the pertinent provisions of the tariff schedules:

"SCHEDULE 5. – NONMETALLIC MINERALS AND PRODUCTS
PART 3. – GLASS AND GLASS PRODUCTS"

Classified under:

Subpart A:

	"Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements:	
* * * * * * *		
540.67	Other optical glass and synthetic optical crystals; polarizing material----------	40% ad val."

Claimed by plaintiff under:

Subpart B:

"*Subpart B Headnotes:*

* * * * * * *

2. For the purposes of this subpart—

* * * * * * *

(c) the term '*colored or special glass*' refers to glass that has a transmittance of normally incident light of less than 66 percent at one or more wave lengths from 400 to 700 millimicrons, inclusive, or a transmittance of less than 80 percent at one or more wave lengths from 525 to 575 millimicrons, inclusive, for glass one-quarter inch in thickness, or of the equivalent transmittances for any other thickness, provided that, in determining such light transmittances, the effect of surface irregularities or configurations, or of other surface treatment (except flashing applied prior to solidification), and the effect of wire netting within the glass, shall be eliminated;

* * * * * * *

Glass (whether or not containing wire netting), in rectangles, not ground, not polished and not otherwise processed, weighing over 4 ounces per square foot:

* * * * * * *

Colored or special glass:

* * * * * * *

542.92	Weighing over 28 ounces per square foot: Not over 2½ square foot in area	0.7¢ per lb.+ 2.5% ad val."

The court has concluded that plaintiff has failed to overcome the presumption of correctness which attaches to the defendant's classification. It is, therefore, appropriate to restate the well-established legal principles surrounding the presumption insofar as they pertain to the burden of proof in customs classification cases.

Congress, in 1970, enacted into statutory law (28 U.S.C. 2635(a)), the previously well-settled principle of decisional law that, in any matter before the Customs Court, the decision of the Secretary of the Treasury or his delegate (here, the classifying official) is presumed to be correct, and that the burden of proving otherwise is upon the person challenging that decision.

The classifying official, as a matter of law, is presumed to have found the existence of every fact necessary to support the classification. *W. A. Gleeson* v. *United States*, 58 CCPA 17, 432 F. 2d 1403 (1970); *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966); *F. H. Kaysing* v. *United States*, 49 CCPA 69, C.A.D. 798 (1962). The presumption of correctness pertains not only to the ultimate conclusion of the classifying official, but also to every subsidiary fact necessary to support that conclusion. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, 435 F. 2d 1315 (1970). As observed by the U.S. Court of Customs and Patent Appeals in the *New York Merchandise Co.* case, the presumption of correctness serves the useful purpose of determining the extent of the importer's burden of proof.

To prevail, in a customs classification case, plaintiff must sustain its burden of proof, and overcome the presumption of correctness that attaches to the classification of the customs official. Authoritative case law leaves no doubt that to overcome this presumption, the plaintiff must prove that the customs classification was wrong, and that its claimed classification is correct. *United States* v. *New York, Merchandise Co., Inc., supra; Technical Tape Corp.* v. *United States*, 55 CCPA 38, C.A.D. 931 (1968).

The presumption of correctness is overcome when plaintiff has discharged "the burden of persuading the trier of the fact of the nonexistence of the presumed fact." Morgan and Maguire, "Looking Backward and Forward at Evidence," 50 Harv. L. Rev. 903, 913 (1937), cited in *Sanji Kobata et al.* v. *United States*, 66 Cust. Ct. 341, 355, 326 F. Supp. 1397, 1407 (1971). There can be no doubt, as indicated by the Court of Customs and Patent Appeals in the *New York Merchandise Co.* case, that the plaintiff must bear "the ultimate burden of persuasion." 58 CCPA at 58. Chief Judge Markey, in the

case of *Solder Removal Company and Jesse C. Hood* v. *United States International Trade Commission, etc.*, 582 F. 2d 628, 633 (1978) stated that "* * * the burden of persuasion is and remains always upon the party asserting invalidity * * *." Although the question presented in that case pertained to the validity of a patent, the similarity between the presumption of validity of a patent under 35 U.S.C. 282 and the statutory presumption of correctness as to actions of customs officials makes Chief Judge Markey's statement especially pertinent here.

Applying these principles to this case, the law presumes that the classifying official found every fact necessary to support the conclusion that the imported glass products were classifiable as optical glass. The principal dispute between the parties, or the issue presented for determination by the court, deals with the facts relevant to the classification of glass or a glass product as "optical glass," as that description is used in the tariff schedules.

It is an established principle of customs law that if the meaning of a word in a tariff provision is in dispute, the correct meaning is to be determined from its common meaning, that is, from its commonly received and popular sense. *United States* v. *Rembrandt Electronics, Inc.*, 64 CCPA 1, 542 F. 2d 1154 (1976); *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, 471 F. 2d 1397 (1973). What constitutes the common meaning of a tariff term is not a question of fact, but a question of law to be decided by the court. In ascertaining and understanding the common meaning of a tariff term, the court may consult dictionaries, scientific authorities and other reliable sources of information. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *Trans-Atlantic Company* v. *United States, supra; Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, 435 F. 2d 1319 (1971).

This court and the U.S. Court of Customs and Patent Appeals have had occasion to interpret and apply the tariff definition of "optical glass." *Semon Bache & Co.* v. *United States*, 25 CCPA 239, T.D. 49339 (1937); *G.A.F. Corp., George S. Bush & Co., Inc.* v. *United States*, 67 Cust. Ct. 167, C.D. 4269 (1971); *Ednal Co., Inc.* v. *United States*, 6 Cust. Ct. 552, Abs. 45423 (1941). Although *Semon Bache* and *Ednal* were decided under the provision for "optical glass" in the Tariff Act of 1930, plaintiff concedes that there is nothing in the legislative history to indicate any intention by Congress to change the definition of "optical glass" in the Tariff Schedules of the United States.

Plaintiff relies heavily upon the *Ednal* case in support of its position. It characterizes the issue in *Ednal* as relating "almost entirely to the question of whether or not the refractive index of the glass was known

or specified." However, as the defendant correctly points out, plaintiff's reliance upon the *Ednal* decision is misplaced and its characterization of the issue upon which that decision turned is inaccurate.

In *Ednal* the imported glass was classified as "optical glass" dutiable at 50 percent ad valorem under paragraph 227 of the Tariff Act of 1930. Plaintiff claimed that it was properly dutiable at only 1¾ cents per pound under paragraph 219 of that act by virtue of T.D. 45313, as "sheet glass," not exceeding 150 square inches, by whatever process made and for whatever purpose used. Without indicating the nature of the evidence upon which it relied the court stated:

> "The evidence offered by the plaintiff definitely shows that the glass in question does not exceed 150 square inches, and it is admitted that it is colored. It is also established by the evidence that the merchandise is not optical glass, as classified by the collector, but that it is sheet glass. The evidence shows, however, that the merchandise is used as photographic filters for cameras. That a camera is an optical instrument was held by the appellate court in *United States* v. *Bliss*, 6 Ct. Cust. Appls. 433, T.D. 35980." 6 Cust. Ct. at 552.

The court added:

> "The only glass provided for in said paragraph for optical instruments or equipment is such glass as is used in the manufacture of lenses or prisms for optical instruments or equipment, and for that purpose this glass is not used. The same is true with reference to 'optical parts.' A filter for a camera is not a lens or prism for a camera." 6 Cust. Ct. at 552–53.

The only authorities upon which the court apparently relied were the following definitions of optical glass:

> "Optical glass is defined in Webster's New International Dictionary as follows:
>
> Optical glass: An extra fine quality of flint or crown glass used for making *lenses*, *prisms*, etc.
>
> Volume 10, page 417 of the Encyclopaedia Britannica defines optical glass as follows:
>
> "The term is usually regarded as applying to the highest qualities of glass used for telescopes, microscopes, *camera lenses* and scientific instruments of precision and not to spectacle lenses and pressed lenses for which inferior glass is used. (Italic ours.)" 6 Cust. Ct. at 553.

Immediately following these definitions the court set forth the following conclusion:

> "Considering the fact that the instant merchandise is not used for making lenses of any kind, the above definitions strongly support the contention of the plaintiff that the merchandise is not optical glass, and that the collector was in error in classifying the merchandise as optical glass." 6 Cust. Ct. at 553.

Having been satisfied that the plaintiff had established a prima facie case, the *Ednal* court held that the merchandise in *Ednal* was improperly assessed at 50 percent ad valorem, and should have been assessed at the lower rate of duty.

The *Ednal* decision can have little if any precedential value. It contains no discussion of the evidence upon which the court concluded that plaintiff established a prima facie case. Furthermore, what is more important for present purposes, there is absolutely no reference or mention of refractive index and dispersion. Indeed, if any meaning is to be attributed to that brief decision it is that the court relied upon two lexicographical definitions which describe optical glass as glass of "extra fine quality" or possessing the "highest qualities."

In *Semon Bache*, the Court of Customs and Patent Appeals stated that the tariff provision for optical glass was intended to include glass "of very high quality * * * such as is used for optical instruments." In amplification of this definition, this court, in the *G.A.F. Corp.* case, held that a glass product, in order to be classifiable as optical glass within the meaning of the TSUS provision for optical glass, must also be capable of performing an optical function, such as aiding human vision.

The plaintiff in *Semon Bache*, unlike the plaintiff in the present case, claimed that its imported glass products should have been classified as optical glass. The Court of Customs and Patent Appeals determined that the record failed to support plaintiff's claim that the imported products were optical glass within the common meaning of that term, particularly because the plaintiff failed to establish that the imported glass was of high quality, or that it was used for lenses or prisms in spectacles or quality optical instruments. The court discussed, but did not decide, the applicability of refractive index in determining whether a glass product was optical glass. It referred to plaintiff's brief which quoted from a publication entitled, "Glass Manufacture," that "optical glass has a refractive index range of 1.40 in one direction to 1.80 in the other direction." There was nothing in the record before the court in *Semon Bache* to show the refractive index of the imported glass.

Applying these authorities on the meaning of optical glass, and the effect of the presumption of correctness which attaches to the classifying officer's decision to the present case, it is presumed that:

(a) the imported glass articles are of very high quality;
(b) are used for optical instruments; and
(c) are capable of performing an optical function.

Plaintiff does not seriously dispute any of these presumptively correct findings of fact, whether ultimate or subsidiary. Indeed, as cogently demonstrated by the analysis of the evidence in defendant's

brief, plaintiff's evidence virtually concedes that its glass products are of very high quality such as are used in optical instruments, and are capable of performing an optical function. Furthermore, it is significant to note that in sales within the trade, plaintiff and distributors of plaintiff's imported glass products in issue characterize them as "optical glass" and "optical filters." Although plaintiff, in its brief, attempts to dismiss such descriptions as "an advertising point," or "mere puffing," the characterizations cannot be denied.

The court's study of the record, and its assessment of the competency and credibility of the several witnesses, make it abundantly clear and the court finds that:

(a) the importations are of a very high quality, i.e., they are homogeneous, and free from imperfections such as seeds, striae, and bubbles;
(b) are used in optical instruments; and
(c) are capable of performing an optical function.

Plaintiff's own witnesses, for example, testified that the imported glass products are used in spectrometers, and can be made into lenses or prisms. For classification of spectrometers as optical instruments, see TSUS item 711.86; "Tariff Classification Study: Explanatory Materials," volume 2, pages 555–56 (1964); "Summaries of Trade and Tariff Information," schedule 7, volume 2, page 197 (1970). Plaintiff's evidence also indicates clearly that the addition of color to a glass product has no effect on the classification of glass as optical glass.

Plaintiff's principal contention is that the definition of optical glass, as set forth in *Semon Bache, G.A.F.*, and standard scientific authorities, is overly broad and not sufficiently specific. Essentially, it seeks to restrict the definition of optical glass.

Plaintiff argues that the criteria for optical glass must be expanded to include certain additional qualities which, of course, plaintiff then contends are not found in its imported glass products. Specifically, plaintiff contends that glass, in order to be classifiable as optical glass, in addition to the criteria previously mentioned, must have a refractive index and dispersion which meet exact specifications. Furthermore, plaintiff maintains that these specifications must be limited to a degree of four to six decimal points, and that the refractive index must be guaranteed. On this aspect of the case, the question presented is whether plaintiff has sustained its burden of proving, by a preponderance of the credible evidence, that the prerequisites for classifying a glass product as optical glass, include a "refractive index and dispersion which are known and controlled to very close tolerances."

The gravamen of plaintiff's case is twofold. Plaintiff must show, as a matter of law, that a refractive index and dispersion within "very

close" tolerances are indispensable requirements of the statutory provision for optical glass. If successful, plaintiff must prove, as a matter of fact, that the imported articles do not possess those necessary requirements, and, therefore, do not satisfy the statutory standard.

The court has concluded that plaintiff has failed to sustain its burden of proof.

Plaintiff's evidence, in support of its argument on the very close tolerances permitted in the refractive index for optical glass, as compared with other glass, is at best ambiguous and uncertain. For example, in one place in its brief, plaintiff characterizes its witnesses' statements regarding the index of refraction and dispersion necessary for optical glass as "at least four decimal places for 'standard' optical glass." Yet, one of plaintiff's witnesses, Mr. William B. Alexander, testified that the tolerance for optical glass is "normally" stated to six decimal places. Mr. Alexander, at another point in his testimony, asserted that the refractive index for optical glass does not differ substantially from other glass, and its range can be "both high and low refractive indexes and everything in between."

Elsewhere in the record, Mr. Alexander agreed with a definition of optical glass found in the "International Dictionary of Physics and Electronics" which made no mention whatever of a refractive index. Mr. Alexander, manager of new products for plaintiff, testified as follows on cross-examination:

> "Q. Let me read the definition of the term 'optical glass' as defined in the International Dictionary of Physics and Electronics: 'Glass to be useful for lenses, prisms and other optical parts through which light passes, as distinguished from mirrors, must be completely homogeneous. This includes freedom from bubbles, striae, seeds, strain, etc.' Do you agree with that definition of the term 'optical glass'?—A. Certainly."

Mr. Alexander did not disagree with the definition of optical glass as described in the "Summaries of Tariff Information," volume 2, part 2, page 102 (1948), but considered it to be "limited," even though this definition specifically mentioned the optical properties of refraction and dispersion. The definition of optical glass given in the "Summaries of Trade and Tariff Information," schedule 5, volume 4, page 33 (1968), is similar to that given in the 1948 "Summaries," except that the 1968 definition differentiates optical glass from nonoptical spectacle glass, specifically includes "high quality" as a characteristic of optical glass, and gives examples of optical instruments. It is significant that the definition in the 1968 "Summaries" also omits mention of refraction and dispersion properties.

Mr. Alexander said that glass is optical glass because of the existence of the refraction and dispersion properties stated in the definition of optical glass found in the 1948 "Summaries". However, as indicated from the following extract from the record, in his personal

view, he would put the refractive properties "on a higher plane than that definition does."

"Q. On the basis of your experience in using optical glass do you know what optical glass is?—A. Well, I would define it in terms of its desirable properties.

Mr. KING. Your Honor, if I may read a definition of optical glass from the Summary of Tariff Information, 1948, on optical glass, paragraph 227, at page 102 of the part 2 volume, it states: 'Optical glass is a clear glass which must meet precise specifications as to chemical composition, homogeneity, and freedom from physical defects. It may be classified into two groups or kinds, based largely on their use: (1) Instrument glass suitable for lenses or prisms in precision optical instruments, and (2) Ophthalmic glass suitable for use in spectacles. Each kind of glass is produced in many varieties which differ in their optical properties—refraction and dispersion.'

Q. Do you agree with this definition, Mr. Alexander?—A. Well, there is nothing to disagree with within it but the definition is limited because it misses the whole point of optical glass, or anyone desiring an optical glass, namely the refracting process."

Q. I believe it did state that each kind of glass has many varieties which differ in the optical properties or the refraction. Is that a sufficient statement of the importance of those properties, the mere fact that they exist?—A. Well, I would say the glass exists because you have to have these properties, so I would put it on a higher plane than that definition does."

Plaintiff called, apparently as an expert witness, Dr. Norbert J. Kreidl, professor of ceramic engineering at the University of Missouri. As may be gleaned from his testimony, Dr. Kreidl also offered his personal views, and what he described as his "own definition" of optical glass:

"To me optical glass means glasses which are made to control the refraction or bending power, and the fine characteristic of this bending power is independent of the wave length, which is called dispersion. The other properties that I mentioned are also indispensable but they are secondary in the sense that they do not always apply to any other property. In other words, an optical glass must have these first mentioned properties to me, but it is also required that it has to have qualities which, however, might have to be had by other products as well."

Dr. Kreidl did not disagree with the definition of optical glass taken from the "Encyclopaedia Britannica," which specifies that optical glass, in addition to being free from imperfections, is obtainable "in a wide variety of optical properties" and must be available in "a wide range of refractive index."

"Q. Dr. Kreidl, I read to you from the Encyclopaedia Britannica, volume 10 of the 1955 edition, on optical glass, at page 419B:

'Optical glass differs from other types of glass in two essential characteristics. The first of these is its freedom from imperfections, of which the most common are unmelted particles, commonly called stones; bubbles; and chemical inhomogeneity, which produces regions of streaks of differing refractive index called striae. The elimination of striae is the most difficult problem in the manufacture of optical glass. The glass must also be physically homogeneous and free from mechanical strain, which is effected by an annealing treatment under conditions determined by the composition of the glass. The second fundamental characteristic of optical glass is that it can be obtained in a wide variety of optical properties. For the manufacture of corrected lens systems, glasses must be available having not only a wide range of refractive index (n_D) but also of dispersion; and for many special cases there is required knowledge not only of the mean dispersion (n_F-n_C) but also of the partial dispersions (n_D-n_C, n_F-n_D, and n_G-n_C). These properties, and a quantity commonly given in optical glass catalogs in the V value [the combined formula for the V value is printed here]. Glasses are available having refractive index from 1.48 (fluor crowns) to 1.8 (extra dense flints) or even higher.' Would you agree with that definition doctor?—A. I do not disagree but the emphasis is entirely in the reverse order. I would take it and I use it in my own definition."

Dr. Kreidl testified as follows that the refractive index for optical glass may vary from three to six decimal places:

"For instance, the refractive index either has to be specified to the third decimal, has to be assured that from piece to piece the variation is not greater than that, but on request you can even demand that this variation is not greater than one in the fourth place within the same piece, the deviation should never be higher than one in the fourth place, but I can demand this deviation to be not higher than one in the sixth place."

Significantly, the definition of optical glass taken from the "Encyclopaedia Britannica," with which Dr. Kreidl did not disagree, specifies that the refractive index for optical glass is from 1.48 to 1.8. As may be noted from the following testimony, plaintiff's witness, Mr. Alexander, testified that the imported glass has a refractive index from 1.49 to 1.6 which is well within the tolerance specified in the "Encyclopaedia Britannica:"

"Q. Is optical glass made with a refractive index that differs substantially from other glasses either higher or lower?—A. No, not really. There is a wide range. This includes both high and low refractive indexes and everything in between.

Q. Are you familiar with the refractive index of Schott's color filter glass?—A. Yes.

Q. Can you tell us what the range is?—A. Well, that range is from about 1.49 to about 1.6, total."

The court finds that plaintiff's evidence is replete with contradictions, inconsistencies, and ambiguities. A statement of a witness,

which is based solely upon his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value. *Keer, Maurer Company* v. *United States*, 46 CCPA 110, C.A.D. 710 (1959); *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1952); *Semon Bache & Co.* v. *United States*, 28 CCPA 166, C.A.D. 140 (1940).

Whether glass, in order to be classified as optical glass, must have the limiting and restricting qualities claimed by plaintiff, is a determination which depends upon the scientific and technical data presented. In the case at bar, the decision of the court is based not only on the various authorities examined, but also upon its careful evaluation of the expert testimony of the witnesses. *See Ameliotex, Inc* v. *United States*, 77 Cust. Ct. 72, 74, 426 F. Supp. 556, 557 (1976), *aff'd*, 65 CCPA 22, 565 F. 2d 674 (1977).

Furthermore, even if the court were to accept plaintiff's argument that glass, in order to be classified as optical glass, must have a known refractive index, plaintiff concedes, and the evidence supports its concession, that the imported glass products do, in fact, have a known refractive index. This refractive index, upon the request of potential purchasers, will be given to two or possibly three decimal places.

Plaintiff also leaves entirely unanswered the question of the legal significance of the distinction between a refractive index known and specified to the third decimal, as contrasted with one known and specified to the fourth decimal. It has made some suggestion that the bending of light, as controlled by lenses or prisms, requires a fourth decimal refractive index. Plaintiff's position, however, was contradicted or undermined by the testimony of its own witnesses which shows that plaintiff's color filter glass can be made into lenses. The fact that plaintiff is able to quote refractive indexes to users upon request, as stated by plaintiff's witnesses, indicates clearly that the imported color filter glass possesses refraction and dispersion properties. Hence, on the basis of the presence or absence of these properties alone, it cannot be distinguished or removed from the category of optical glass.

Plaintiff suggests that the fact that it will specify but not guarantee the refractive index of the color filter glass distinguishes its merchandise from optical glass. However, assuming the necessity of refractive properties for optical glass, it presented no evidence which shows that the refusal to guarantee has any legal consequence or significance on the tariff classification of the imported glass.

One further question, raised at trial and not satisfactorily pursued by plaintiff, deals with the element of absorption. According to plaintiff's witnesses, absorption is the loss that light suffers when it passes

through glass, i.e., different colors of glass are used selectively to absorb different wave lengths of light. Plaintiff's witnesses testified that absorption is an optical property. Plaintiff's witnesses also testified that in many of the uses of color filter glass, including use in optical instruments such as spectrometers, this glass was specifically employed for its absorption property. Plaintiff, however, did not indicate why high-quality glass, used to perform the optical function of absorption in an optical instrument, should not be classified as optical glass irrespective of its refractive and dispersive properties.

Notwithstanding the able efforts of plaintiff's counsel, and the quantity of plaintiff's evidence, the court finds that plaintiff has not succeeded in restricting the tariff definition of optical glass by adding the additional requirements or properties that it has suggested. It has not proved that Congress intended a meaning for optical glass "so limited as to exclude the importation at issue" *Hayes-Sammons Chemical Co.* v. *United States*, 55 CCPA 69, 72, C.A.D. 935 (1968). See also remarks of Judge Rich in *United States* v. *A. Johnson & Co. Inc.*, 66 CCPA—, C.A.D. 1218 (Dec. 7, 1978), on the importer's burden of proof.

It is important to note that the defendant did not merely rely upon the statutory presumption of correctness. It has submitted competent, reliable, and credible affirmative evidence, which the court has found persuasive, to support the presumption that the importations are within the common meaning of the provision for optical glass.

As witnesses, the defendant called Mr. Richard N. Mostrom, Mr. Robert C. Saxton, and Dr. Radu Mavrodineanu. Mr. Mostrom, who has a master of science degree in optical engineering from the Institute of Optics at the University of Rochester, is responsible for work direction in the area of optical systems and optical instrument design at Honeywell, Inc. He has used the plaintiff's color filters in his work at Honeywell, particularly in the area of contrast enhancement of television systems. He has also used the filters in his previous work at the Delco Electronics Division of General Motors and at American Optical and Owens-Illinois. Mr. Saxton, employed by Corning Glass Works for 28 years, has spent the last 9 years in the company's optical products department working entirely with color filter glass. Dr. Mavrodineanu, whose Ph. D. is in organic chemistry, is employed in the special analytical instrumentation section of the division on analytical chemistry of the National Bureau of Standards in Washington, D.C. He uses the plaintiff's color filters in his research and development work in high-accuracy spectrophotometry and optical emission spectrometry.

These witnesses established to the satisfaction of the court that the glass filters manufactured by plaintiff, such as those imported in

this case, are of very high optical quality, and are used in the production of optical systems, including optical lenses and lens systems in which uses they function optically. The testimony of defendant's witnesses also showed that color filter glass is one type of optical glass, and that the imported products are characterized within the optical glass industry as optical glass. Finally, the defendant's witnesses testified that the imported glass products are within standard definitions of "optical glass."

In view of the foregoing, it is the determination of the court that plaintiff's evidence is unconvincing, and is inadequate to overcome the presumption of correctness which attaches to the classification of the imported glass as optical glass.

After a careful study of the entire record, and the testimony of the witnesses in particular, it is the determination of the court that plaintiff has not succeeded in establishing that the imported glass products are not "optical glass" within the meaning of item 540.67 of the Tariff Schedules of the United States.

The protest is overruled, and judgment will be entered accordingly.

(C.D. 4784)

APF Electronics Inc. *v.* United States

Game equipment—Game machines

Merchandise invoiced as "T.V. Games" which was classified by the government under item 735.20 of the tariff schedules as game equipment *held* properly classifiable under item 734.20 as game machines, as claimed by plaintiff.

Court No. 77-7-01140

Port of Chicago

[Judgement for plaintiff.]

(Decided January 17, 1979)

Sharretts, Paley, Carter and *Blauvelt* (*Peter Jay Baskin* and *Raymond F. Sullivan, Jr.*, of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Susan C. Cassell*, trial attorney), for the defendant.

Maletz, Judge: This case involves the proper tariff classification of merchandise invoiced as "T.V. Games" that was exported from Japan and entered at the port of Chicago in 1976. The merchandise was classified by Customs under item 735.20 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, as game

equipment not specially provided for and assessed duty at the rate of 10 percent ad valorem.

Plaintiff's principal claim is that the merchandise is properly classifiable under item 734.20, TSUS, as modified by T.D. 68–9, as game machines, dutiable at the rate of 5.5 percent ad valorem.[1]

The pertinent provisions of TSUS read as follows:

Classified under:		
	Schedule 7, Part 5, Subpart D:	
735.20	Puzzles; game, sport, gymnastic, athletic, or playground equipment; all the foregoing, and parts thereof, not specially provided for	10% ad val.
Claimed under:		
	Schedule 7, Part 5, Subpart D:	
734.20	Game machines, including coin or disc operated game machines and including games having mechanical controls for manipulating the action, and parts thereof	5.5% ad val.
Alternative claim:		
	Schedule 6, Part 5:	
688.40	Electrical articles, and electrical parts of articles, not specially provided for	5.5% ad val.

The Record

The record in this case consists of a stipulation of facts and four joint exhibits. The stipulation is as follows:

1. The accompanying samples are representative of the imported merchandise. Model 401 is representative of those described on the invoices as model 401 and 401(A) and model 444 is representative of those described on the invoices as model 401(D).

2. The subject merchandise is imported with an owner's manual, containing written game description and objectives, one of which states that the first player and/or team to score fifteen (15) points wins the game.

3. In order to be used for its intended purpose, the imported merchandise is intended to be and is used by connecting it to a standard television set.

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[1] Plaintiff alternatively claims the imported merchandise is classifiable (1) under item 734.20 as parts of game machines; or (2) under item 734.20 as games having mechanical controls for manipulating the action, or parts thereof; or (3) under item 688.40, as modified by T.D. 68–9, as electrical articles not specially provided for, dutiable at the rate of 5.5 percent ad valorem.

In addition, plaintiff moves in its brief to amend the complaint to include a claim under item 685.20, as modified by T.D. 68–9, for classification of the merchandise as television transmission and reception apparatus, dutiable at the rate of 5 percent ad valorem. However, as set out below, this case has been submitted on an agreed statement of facts. In that circumstance, it would be manifestly prejudicial to the defendant and contrary to rule 4.8(b) to allow such amendment.

4. When connected to a television set, the imported merchandise described as model 401 and 401(A) on the invoices can be used by one or two persons and the model 401(D) can be used by one to four persons.

Model 401 is illustrated in the Owner's Manual (joint exhibit 2(B)) as follows:

TV FUN MODEL NO. 401

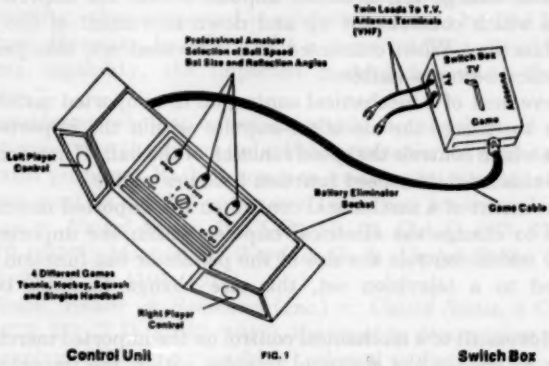

FIG. 1

Model 444 is illustrated in the Owner's Manual (joint exhibit 3(B)) as follows:

TV FUN MODEL NO. 444

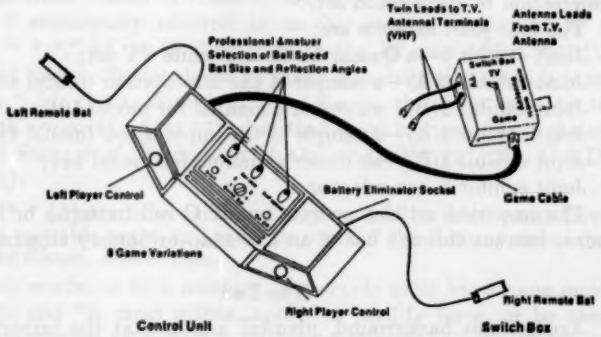

FIG. 1

5. When the imported merchandise is connected to a television and used by one person, the person's object is to exercise or demonstrate skill or adeptness. When the imported merchandise is used by more than one person, the object is to win the game.

6. When connected to a television, the imported merchandise transmits an electrical impulse to the television which, in conjunction with the electronic circuitry of the television causes an image or images to appear on the television screen.

7. Movement of a mechanical control on the imported merchandise operates to change the electrical impulse within the imported merchandise which controls the up and down movement of the paddle or bat function. When connected to a television set, this paddle or bat function becomes visible.

8. Movement of a mechanical control on the imported merchandise operates to change the electrical impulse within the imported merchandise which controls the speed function of the ball. When connected to a television set this speed function becomes visible.

9. Movement of a mechanical control on the imported merchandise operates to change the electrical impulse within the imported merchandise which controls the size of the paddle or bat function. When connected to a television set, this size change function becomes visible.

10. Movement of a mechanical control on the imported merchandise operates to change the electrical impulse within the imported merchandise which controls the angle of ball function. When connected to a television set, this angle of ball function becomes visible.

11. The imported merchandise has within it a self-contained audio portion which produces and transmits sounds intended to function as part of the game system; this audio portion remains unaffected by connection to a television set.

The four joint exhibits are:

Joint exhibit 1—a Quasar black and white TV set;

Joint exhibit 2(A)—a sample of the importation (model 401);

Joint exhibit 2(B)—an owner's manual for model 401;

Joint exhibit 3(A)—a sample of the importation (model 444);

Joint exhibit 3(B)—an owner's manual for model 444;

Joint exhibit 4—an adaptor.

The imported articles operate on six C cell batteries or from a.c. house current through use of an a.c. adaptor/battery eliminator.

The Law

Against this background, plaintiff argues that the imported merchandise is within the common meaning of the term "game" by virtue of the uncontested facts; and that the merchandise is within the com-

mon meaning of the term "machine." Hence, plaintiff claims that the importations are properly classifiable as "game machines" within the meaning of item 734.20. Defendant, on the other hand, contends that the imported merchandise is not a game machine because (1) in its condition as imported, it is not capable of performing any game function and (2) it is not a "machine." For the reasons that follow, it is concluded that the imported articles are "game machines" within the meaning of item 734.20 and that plaintiff's claim must accordingly be sustained.

At the outset, it is undisputed that the imported merchandise has the capability, when connected to a television set, to be used for playing games. However, in order to be a game machine, in addition to its game capability, the imported merchandise must also be a "machine."

In considering whether or not an article is a machine, it must be borne in mind that there is no judicial determination of what a machine is for tariff purposes. Rather, common meaning is determinative and each case must be decided on its own facts. See, for example, *Morris Friedman* v. *United States*, 57 CCPA 92, 95, C.A.D. 983, 425 F. 2d 768, 770 (1970); *Montgomery Ward & Co.* v. *United States*, 66 Cust. Ct. 233, 239, C.D. 4195 (1971).

In *Simon, Buhler & Baumann (Inc.)* v. *United States*, 8 Ct. Cust. Appls. 273, 277, T.D. 37537 (1918), the court in determining the common meaning of the term "machine" referred to dictionary definitions and concluded that an imported brewery mash filter was not a machine because it was not "*a mechanical contrivance for utilizing, applying, or modifying energy or force or for the transmission of motion.*" (Italic added.) Subsequently, in *United States* v. *Idl Mfg. & Sales Corp.*, 48 CCPA 17, C.A.D. 756 (1960), the court stated that the above italicized clause in *Simon, Buhler* "has been * * * often, and * * * erroneously referred to as this court's 'definition' of a machine * * *." Id. at 19. The court in the *Id'* case added that "if the quoted *Simon, Buhler* clause be taken as a definition, then it is an absurdity." Id. at 20. Withal, in the *Idl* case, the court went on to quote with approval (id. at 22) what that court had previously stated in *United States* v. *J. E. Bernard & Co.*, 30 CCPA 213, 219, C.A.D. 235 (1943):

> * * * [A] machine such as Congress had in mind must have some movable parts, and must do some of the things pointed out in the *Simon, Buhler* case.

In other words, to be a machine, the article must have some movable parts and "it must utilize, apply, or modify force, or be used for the translation of motion." *Rosenblad Corp.* v. *United States*, 49 CCPA 81, 85, C.A.D. 800 (1962). See also, e.g., *Nord Light, Inc.* v.

United States, 49 CCPA 12, 15, C.A.D. 786 (1961); *William H. Masson, Inc.* v. *United States*, 66 Cust. Ct. 55, 62–3, C.D. 4167 (1971).

Applying these principles to the case at hand, here, the imported merchandise has movable parts, such as knobs, switches, and controls. In addition, the articles serve to modify energy or, specifically in this case, they change electrical impulses in such a way as to form visual images and create and transmit sound. It is also to be noted that the imported articles possess the optional capabilities of relying upon their own internal power source (when batteries are installed) or utilizing an external power supply by attachment of readily obtainable adaptors to ordinary house current. Further, the fact that the articles operate in conjunction with electrical as opposed to physical forces does not preclude them from classification as machines. See, e.g., *United States* v. *L. Oppleman, Inc.*, 25 CCPA 168, T.D. 49271 (1937); *United States* v. *J. E. Bernard & Co.*, *supra*, 30 CCPA 213.

Particularly relevant in the present case are *United States* v. *Janson Co.*, 16 Ct. Cust. Appls. 315, T.D. 43075 (1928) and *Allen Forwarding Co.* v. *United States*, 49 Treas. Dec. 706, T.D. 41506 (1926), wherein radio receiving sets were held to come within the term "machine." In *Allen Forwarding Co.*, the court stated (id. at 708):

> However, we experience no hesitancy in holding that a radio receiving set is a machine, and that the present loud speakers and movements therefor are exclusively employed as parts thereof. * * * A radio set takes waves electrically broadcasted and by utilizing and applying thereto electrical energy or force so modifies those waves that it produces sounds through the mechanical vibration of its diaphragm. * * *

In the *Janson Co.* case, the court stated the same proposition in the following manner (16 Ct. Cust. Appls. at 317):

> A radio receiving set, having conducted to it the tenuous impacts of electrical energy, receives and manipulates them and in a most marvelous way converts them into a reproduction of sound. If this is not a machine it would be hard to conceive what would constitute one.

The imported articles before the court perform much the same functions as the radio receiving sets discussed above. For the articles (in addition to having a self-contained audio producing function) manipulate (modify or change) electrical impulses to produce visual images. The articles can be manipulated so as to cause a change in the paddle size, speed of the ball, the movement of the paddles, the image of the playing court, and the angle of the ball projectory. Although connection to a television set is required in order to see these changes, the modification of the electrical impulses actually takes place within the imported articles.

Defendant, however, insists that the imported articles cannot be "machines" because they require attachment to television sets in

order to perform their ultimate function in connection with game playing. However, a similar argument was rejected in *Lanvin Parfums, Inc.* v. *United States*, 54 Cust. Ct. 273, C.D. 2543, appeal dismissed, 53 CCPA 155 (1965), where certain atomizer tops were held to be machines notwithstanding that in order to function they had to be attached to a bottle having a matching thread. Such bottles were not imported with the atomizer tops and were not a subject of the court's determination. The court stated (54 Cust. Ct. at 277):

> We consider as untenable the contention of defendant herein that the imported articles "standing alone" can not perform their intended function. In this regard, we believe the atomizers in controversy to be just as much machines in themselves and capable of performing the function for which they were designed as were the pulleys in the *Nord Light* case, *supra*, which, when in use, were attached by a cable to a suspended object, and the rotary lawn sprinklers in *The Durst* case, *supra*, which, to fulfill their purpose, must be attached to lengths of hose and water pressure applied.

In both of the cases cited above (*The Durst Mfg. Co., Inc.* v. *United States*, 50 CCPA 56, C.A.D. 820 (1963), and *Nord Light, Inc.* v. *United States*, *supra*, 49 CCPA 12), the Court of Customs and Patent Appeals held articles to be classifiable as machines despite the fact that each required the attachment of an object outside the machine itself in order to be capable of performing its intended function.

In the *Durst* case, rotary lawn sprinkler tops which were conceded to be parts of rotary lawn sprinklers were held to be parts of machines since the court found that rotary lawn sprinklers were machines for tariff purposes. The facts in that case are similar to those here in that the rotary lawn sprinklers had no use whatever until they were attached to a garden hose and the water from the hose activated the sprinklers.

In *Nord Light, Inc.*, *supra*, the merchandise consisted of light fixture pulleys into which cable was threaded so that one end of the cable could be attached to a ceiling mounted support bracket and a light fixture could be attached to the other end of the cable. By moving the pulley upward or downward the light fixtures attached to the cable could be raised or lowered to a desired position and held at that position by the interior mechanism of the pulley. This light fixture pulley was held to be a machine for tariff purposes by the Court of Customs and Patent Appeals. Here again, as with the importations before us, the facts clearly show that the imported pulleys could not be used in the condition in which imported and had to be used in conjunction with another article, i.e., a light fixture.

Another relevant case is *Westinghouse Electric International Co.* v. *United States*, 28 Cust. Ct. 209, C.D. 1411 (1952), where it was claimed that certain articles were not photographic cameras because they

were incapable of functioning as a camera except when attached to a particular X-ray apparatus. The court found the importations were classifiable as photographic cameras on the following basis (id. at 214):

> While, in its condition as imported, the Helm camera before us is incapable of taking any kind of a picture and cannot take a photograph nor use ordinary photographic film and can only function when used with a particular kind of X-ray apparatus, it, nevertheless, in its final use, is a camera which takes and produces a photograph. We, therefore, find that the imported article is a photographic camera as that article is described in paragraph 1551.

Fourteen years later the Court of Customs and Patent Appeals in its review of the third trial involving the above-discussed camera cited with approval the determination of this court in the *Westinghouse* case. See *Fairchild Camera & Instrument Corp., Inter-Maritime Forwarding Co., Inc.* v. *United States*, 53 CCPA 122, 126, C.A.D. 887 (1966).

The foregoing cases—which have neither been distinguished nor even cited by the defendant—are thus controlling. Moreover, item 734.20, the provision for game machines, is, as the parties agree, more specific than item 735.20, the provision for game equipment under which the imported merchandise was classified. Therefore, under the rule of relative specificity—TSUS general interpretative rule 10(c)—the imported merchandise is properly classifiable under item 734.20 as game machines, as claimed by plaintiff. Judgment for plaintiff will be entered accordingly.

(C.D. 4785)

ELSE SCHMELZER DBA STAUFEN STUDIO *v.* UNITED STATES

Lack of jurisdiction

Court No. 78-11-01955

Port of Cleveland

[Motion to dismiss granted.]

(Dated January 31, 1979)

Else Schmelzer, plaintiff *pro se*.

Barbara Allen Babcock, Assistant Attorney General (*Robert H. White*, trial attorney), for the defendant.

RICHARDSON, Judge: The defendant moves to dismiss this action on the ground that the court lacks jurisdiction of the subject matter.

The action contests denial of protests challenging the liquidation of six (6) entries of merchandise, described as, among other things, arts of wood or wooden wares, on July 15, 1977, under TSUS items 207.00 and 725.50 at the duty rate of 8 per centum ad valorem without allowing a claimed 15 percent wholesale discount.

The protests were denied on May 3, 1978. And on November 3, 1978, or 184 days after denial of the protests, a summons embracing the protests was filed with the court. The record discloses that plaintiff mailed the original and copies of the summons to the office of defendant's attorney on October 30, 1978, or 180 days after denial of the protests, that the summons was received by counsel on November 2, 1978, and forwarded by counsel to the clerk of this court on November 3, 1978, the date of the filing of the summons, and that a letter was sent to plaintiff by counsel on the same date advising plaintiff of the forwarding of the summons to the court.

The foregoing constitutes the factual basis underlying the instant motion in which defendant contends that under 28 U.S.C.A. 2631 an action contesting denial of a protest is required to be filed within 180 days of the denial of the protest, and that in this case the summons was filed with the clerk of this court on the 184th day following denial of the protests. Plaintiff responds by asserting that the summons was mailed on the 180th day following denial of the protests in accordance with rule 3.2(b) of the rules of this court.

Rule 3.2(b) which regulates the manner in which a summons is required to be filed in the Customs Court provides:

> For purposes of commencement of an action a summons sent by registered or certified mail *properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007*, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark [italic added].

Since the summons was not addressed to the clerk of the court as provided for in the rule, it cannot be said that the summons was filed in accordance with rule 3.2(b) so as to be deemed filed as of the date of the postmark, and the court so finds. And inasmuch as the summons was actually received and filed on November 3, 1978, which is 184 days after denial of the protests, the action was commenced too late, in consequence of which, the court lacks jurisdiction of the action.

The defendant's motion to dismiss for lack of jurisdiction is, therefore, granted.

(C.D. 4786)

ZWICKER KNITTING MILLS *v.* UNITED STATES

Gloves

AMERICAN GOODS RETURNED

Knit glove shells and precut palms, products of the United States, were processed in Haiti into completed gloves and classified under item 704.85, TSUS, as unornamented knit gloves of man-made fibers and under item 704.65, TSUS, as modified, as wool gloves valued over $4 per dozen pairs. Duty allowance under item 807.00, TSUS, as amended, was allowed by Customs as to the precut palms, but was denied as to the knit glove shells. Plaintiff challenges the refusal of Customs to make an allowance for the cost or value of the knit glove shells under item 807.00, as amended. *Held*, duty allowance under item 807.00, as amended, *disallowed* as to the knit glove shells for failing to qualify as articles "exported in condition ready for assembly without further fabrication" and as articles that "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting."

ITEM 807.00—FURTHER FABRICATION

The testimony and exhibits of record demonstrated that completing the fingertips of the knit glove shells by the "tipping" operation performed in Haiti constituted "further fabrication" within the meaning of clause (a) of item 807.00, as amended. The "tipping" operation completed the manufacturing process commenced in the United States on the knit glove shells. The knit glove shells required additional fabrication or manufacture, and therefore were not fabricated components "ready for assembly without further fabrication." *See Rudolph Miles* v. *United States*, 65 CCPA 32, 567 F. 2d 979 (1978); *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, 470 F. 2d 629 (1972); *Baylis Brothers Co.* v. *United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA 9, 451 F. 2d 643 (1971).

ITEM 807.00—ASSEMBLY

"Assembly," in the context of item 807.00, signifies the fitting or joining together of parts in themselves already finished manufactured or fabricated components. *J. E. Bernard & Co.* v *United States*, 57 CCPA 52, 420 F. 2d 1403 (1970); *C. J. Tower & Sons of Buffalo, Inc.* v. *United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187 (1969); 19 CFR 10.12(b). The "tipping" operation is not an act of assembly because it is the process of completing the fabrication of the knit glove shell that was commenced in the United States. Thus the knit golve shell was not a finished manufactured or fabricated component prior to the 'tipping" operation.

ITEM 807.00—PHYSICAL IDENTITY TEST

Physical changes in form or shape of the article exported from the United States do not necessarily lead to loss of "physical identity"

within the meaning of clause (b) of item 807.00, as amended. The test specified in item 807.00, as amended, is whether the fabricated components have been changed in form, shape, or otherwise to such an extent that they have lost their physical identity in the assembled article. The testimony and exhibits demonstrate that the knit glove shells did not lose their physical identity by reason of operations performed in Haiti. *See United States* v. *Baylis Brothers Co.*, 59 CCPA 9, 12, 451 F. 2d 643, 646 (1971).

ITEM 807.00—ADVANCED IN VALUE

The various operations performed in Haiti increased the value and improved the condition of the knit glove shells. The "tipping" operation was not an operation "incidental to the assembly process" of precut palms with the knit glove shells. The procedures involved in the "tipping" operation were not *ejusdem generis* with "cleaning, lubricating, and painting," and were not of a minor nature as contemplated by the legislative history of item 807.00, as amended. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 48–49 (1965).

Court No. 75-12-03110

Port of Milwaukee

[Judgment for defendant.]

(Decided February 1, 1979)

Barnes, Richardson & Colburn (*Steven P. Sonnenberg* and *Robert E. Burke* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Bruce M. Mitchell* and *Bernard J. Babb*, trial attorneys), for the defendant.

RE, Chief Judge: The question presented in this action pertains to the lawful customs duties to be assessed on certain acrylic and wool knit gloves exported from Haiti and entered at the port of Milwaukee, Wis.

The acrylic gloves were classified under item 704.85 of the Tariff Schedules of the United States [TSUS] as unornamented knit gloves of man-made fibers, and assessed at 25 cents per pound plus 32.5 percent ad valorem. The wool gloves were classified under item 704.65, TSUS, as modified, as wool gloves valued over $4 per dozen pairs, and assessed at 37.5 cents per pound plus 18.5 percent ad valorem. Duty was assessed on both types of gloves under item 807.00, TSUS, as amended, upon the full appraised value of the gloves less the cost or value of precut palms assembled with the knit glove shells in Haiti, which were fabricated components of the United States.

Plaintiff does not dispute the classification, but challenges the refusal of the customs officials to make an allowance for the cost or value of the knit glove shells under item 807.00, TSUS.

Item 807.00, as amended by Public Laws 89–241 and 89–806, pursuant to which the allowance is claimed, provides:

"Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting..	A duty upon the full value of the imported article, less the cost or value of such products of the United States . . ."

Plaintiff contends that the knit glove shells meet every requirement of item 807.00, TSUS, and, therefore, are entitled to the prescribed duty allowance.

Defendant disputes this claim and maintains that plaintiff has failed to prove compliance with clauses (a), (b), and (c) of item 807.00, TSUS.

At the outset, reference may be made to the burden of proof that the plaintiff must bear in the present action. To prevail, plaintiff must rebut the statutory presumption of correctness, which provides that, "[i]n any matter in the Customs Court: (a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging a decision." 28 U.S.C. 2635. See discussion in *United States* v. *New York Merchandise Co.*, 58 CCPA 53, 435 F. 2d 1315 (1970).

Under item 807.00, TSUS, the governing statutory provision, in order to be entitled to the claimed allowance, plaintiff must establish that:

a) the glove shells were exported in condition *ready for assembly without further fabrication;*
b) the glove shells had not lost their physical identity by change in form, shape, or otherwise; and that
c) they *had not been advanced in value, or improved in condition abroad,* except by being assembled, and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

It is clear beyond doubt that the statutory allowance cannot be granted unless all three of the statutory requirements are satisfied.

The statutory language is clear, and it is the duty of the courts to give effect to the legislative policy expressed in a valid statute.

In general terms, therefore, the question presented is whether plaintiff has rebutted the statutory presumption of correctness which attaches to the action of the customs officials in not granting the claimed allowance under item 807.00, TSUS. More specifically, it is whether plaintiff has succeeded in bearing its burden of proof by establishing that the knit glove shells were "assembled abroad" in compliance with the statutory requirements set forth in clauses (a), (b), and (c) of item 807.00, TSUS.

Summary of operations performed abroad

The steps performed in plaintiff's plant in Wisconsin were described by two of plaintiff's witnesses: Mr. James Ertl, research director of Zwicker Knitting Mills, and Mr. Patrick Hughes, manufacturing manager of knitting accessories for Zwicker Knitting Mills.

The glove shells were knit in Wisconsin on knitting machines specially modified by plaintiff. The knitting machines could not complete or finish the fingertips of the glove shells. The knit glove shells have a yarn "float," or piece of yarn, that is a continuation of the knit glove shell that is used to close the fingertips in Haiti. The palms were die-cut on a clicker in plaintiff's factory from regular leather skins. The knit glove shells and the precut palms were then exported to Haiti. In one of the entries, a separate piece of yarn was exported with the knit glove shells and was used to close the fingertips.

The steps or operations performed in Haiti were described by one of plaintiff's witnesses, Mr. John R. Vandenberg, technical director of plaintiff's Haitian operation. Mr. Vandenberg testified that the merchandise arrived in Haiti in large shipping cartons. Upon arrival, the shipments were broken down. The knit glove shells, and in one of the entries, the separate piece of yarn, were moved to the department where the fingertips were finished or completed in what was called a "tipping" operation.

In the first step in the "tipping" operation, the yarn "floats," which are continuations of yarn between the open fingertip and base of the finger, were cut at the base of the finger. The glove finger was placed over a metal post large enough to fill a glove finger. The top row of knitted loops was unraveled to expose new, clear loops. A dulled needle was threaded with the yarn "float" and passed through the row of loops on one side of the fingertip. The needle and yarn were pulled through, the glove was turned on the post and the needle and yarn pulled through the loops on the other side of the fingertip. The top rows of stitches on each side were pulled together by stitches across the top of the fingertip about three-quarters of the way across before three tacking or stay stitches were made. On the fourth tacking

or stay stitch, the needle was brought down inside the finger and out. The yarn was then trimmed. This process was repeated for each of the five fingertips of the knitted glove shells.

When the "tipping" operation was completed, the gloves were turned inside out, and were run between rotating wire brushes. They were then turned rightside out and tumbled in a large dryer.

Thereafter, the knit glove shells were placed on wire forms and passed through a steam tunnel for shaping before being inspected for flaws. The gloves were then paired.

After the completion of the "tipping" operation and the subsequent processing, the precut palms were sewn on the gloves. After the palms were sewn onto the gloves, the completed gloves were again shaped and inspected before being ticketed, packed and exported to the United States.

Mr. Vandenberg demonstrated the various steps in the "tipping" operation on one fingertip of a sample glove shell that had been introduced into evidence.

Plaintiff introduced as exhibits a series of photographs illustrating the steps in the "tipping" operation. Also introduced into evidence were samples of the knit glove shells before "tipping," and as imported into the United States as completed gloves.

Requirements of clause (a) of item 807.00

In determining whether the knit glove shells comply with the requirements of clause (a) of item 807.00, TSUS, the initial question is whether they were "fabricated components" exported "in condition ready for assembly without further fabrication." More specifically, the question is whether the "tipping" operation performed in Haiti constituted a further fabrication. There can be no doubt that if there was "further fabrication," the knit glove shells do not meet the statutory requirements of clause (a) of item 807.00, TSUS.

Plaintiff claims that the knit glove shells were fabricated components in condition ready for assembly without further fabrication when exported. Plaintiff labels the "tipping" operation an assembly process whereby the yarn "float," or the separate piece of yarn, is "assembled" with the knit glove shell to form a knit glove.

Defendant, contending that the knit glove shells were not "ready for assembly" as required by clause (a), objects to plaintiff's studied reference to the "tipping" operation as an "assembly." Defendant contends that when exported, the glove shells were not completed "fabricated components." According to the defendant, the "tipping" operation was a further fabrication necessary to complete or finish the component material (knit glove shells) for assembly with the precut palms. Hence, the knit glove shells could not be *ready* "for assembly without further fabrication."

Although the statutory requirement is clear, there is no one, all-embracing definition of what steps or processes constitute "further fabrication" within the meaning of item 807.00, TSUS. Whether a particular process constitutes a "further fabrication" depends upon the facts of the particular case. In the recent case of *Rudolph Miles* v. *United States*, 65 CCPA 32, 567 F. 2d 979 (1978), Judge Rich, writing for the Court of Customs and Patent Appeals appropriately noted that:

> "With regard to the requirement of clause (a), we agree with the appellee that 'In its present form, item 807.00 * * * basically encompasses only American merchandise returned without substantial change or improvement.' Of course, whether substantial change or improvement has occurred is to be determined from the facts of each case." 567 F. 2d at 982.

In *Rudolph Miles*, the appellate court determined that the burning of 31 approximately 1-inch holes, two slots approximately 14 by 3 inches and one slot 10 by 2½ inches, in a 55-foot steel Z-beam to be assembled into a railroad boxcar was not such a substantial change as to constitute a further fabrication. The slots were burned into the Z-beams to allow insertion of draft keys at each end, which fit the couplers to the yokes, and to allow the brake piping to pass through. The 31 holes were burned into the Z-beams to permit installation of wear plates to protect the Z-beams from damage and support plates to maintain additional parts that are attached to the Z-beams.

The appellate court recognized that, viewed in isolation, the operations performed on the Z-beams seemed to produce substantial changes. The court, however, determined that, in relation to the massive size of the steel Z-beams, the changes and improvements made were not so extensive as to constitute a "further fabrication":

> "[T]he components require their own appropriate techniques because they are *large* steel parts. Such parts must be rigidly secured if they are to withstand the stresses that they must as boxcar components. Thus, in perspective, burning the slots and holes of the aforestated dimensions in 55′ steel Z-beams to permit their assembly is not such substantial change as constitutes further fabrication." 567 F. 2d at 983. (Italic in original.)

It was clear in *Rudolph Miles* that the Z-beams were completed "fabricated components." The question presented pertained solely to the steps or processes performed on admittedly finished components. In reaching its determination that the processes did not constitute a further fabrication, the appellate court looked not only to the actual steps performed, but also considered the cost and amount of labor expended. It expressly noted that the "component Z-beams [did] not require *significant* labor to enable them to be incorporated into boxcars." 567 F. 2d at 982. (Italic in original.) The court stated that

"[t]he evidence established that the total labor in Mexico required a maximum of 104 minutes at a cost of $12 (the value of a pair of Z-beams being alleged as $395), or only 3 percent of the value of a beam." Id.

Not all operations to which an article may be subjected for assembly will necessarily preclude qualification for allowance under item 807.00, TSUS. Plaintiff, citing *General Instrument Corp.* v. *United States*, 60 CCPA 178, 480 F. 2d 1402 (1973), urges that the "tipping" operation is an example of an operation constituting an assembly process within the purview of clause (a). The *General Instrument* case, however, is readily distinguishable. In that case, anode foil, cathode foil, paper, metal tabs, plastic insulating film, and cellophane tape were exported from the United States to Taiwan for assembly into electrolytic capacitors. All of the components were exported in rolls of the width necessary for assembly except the anode foil. The only operation to which these items were subjected for the actual assembly process was cutting some of the components to length, and, in the case of the anode foil, trimming the edges to the proper width. To the same effect, *see United States* v. *Texas Instruments Inc.*, 64 CCPA 24, 545 F. 2d 739 (1976) (silicon slices); *General Instrument Corp.* v. *United States* 61 CCPA 86, 499 F. 2d 1318 (1974) (television deflection yokes) and *General Instrument Corp.* v. *United States*, 59 CCPA 171, 462 F. 2d 1156 (1972) (transistors).

In the present action, the yarn "float" is cut from the knit glove shell, and is used in the "tipping" operation. It is not the cutting of the yarn "float," but the completion of the fingertips by the "tipping" operation, that is crucial as to whether there was an "assembly" or a "further fabrication."

In *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, 470 F. 2d 629 (1972), the opening, oiling, and carding of bulk fibers, which were assembled with fabric to produce papermakers' felts, constituted a further fabrication of the fibers. The court noted that "[w]hat was exported here was a fiber mass in bulk on which much further labor was expended to put it into the condition required to enable it to be needled into the fabric." 60 CCPA at 44, 470 F. 2d at 633.

Similarly, in *The Rubberset Co.* v. *United States*, 73 Cust. Ct. 107, C.D. 4560, 383 F. Supp. 1403 (1974), nylon filaments of American origin were shipped in bulk to Canada where they underwent various sorting and selection processes prior to their assembly into paintbrush knots and paintbrushes. The court held that this interim processing, without which the filaments as exported would not have been capable of being assembled, constituted a "further fabrication" within the meaning of clause (a) of item 807.00.

The "tipping" operation in the present case constitutes an even clearer example of "further fabrication." That "to fabricate" means

to construct or manufacture may be gleaned from any standard dictionary. The "tipping" operation is nothing less than the completion or finishing of the manufacturing process that was begun by the knitting machine in the Wisconsin plant. The testimony of plaintiff's director of the Haiti operation, Mr. John R. Vandenberg, makes this clear. The yarn "float" that is used to close the fingertips is, in all but one case, an extension of the very same yarn used to knit the glove shells, and is cut from the knit component only moments before it is used to make the fingertips. In one of the entries, a separate piece of yarn is exported with the knit glove shell to be used in the "tipping" procedure. This yarn is the same type of yarn used to knit the glove shells, and, according to Mr. Vandenberg, comes from yarn ends from the knitting of other gloves.

The yarn "float" is not used simply to sew the fingertips closed. Rather, it is passed through the top row of loops left by the machine knitting process on each side, and is passed through the top row of stitches about three-quarters of the way across before three tacking or stay stitches are taken across the top of the tip. In relation to the glove shell, this procedure is substantial, and, regardless of the word or label selected to describe it, is in fact an indispensable completion or finishing of the knitting process.

This conclusion is fully supported by the testimony on cross-examination of Mr. Patrick Hughes, plaintiff's manufacturing manager of knitting accessories. Mr. Hughes testified that the knitting machines could knit a complete glove shell with fingertips closed on certain glove styles, but could not complete the styles of gloves that are the subject of this action. Other than programming the knitting machines for the pattern to be knit, and supplying the machines with yarn, the only hand labor required in the manufacturing process in the United States was cutting and separating the knit glove shells as they came off the knitting machines. When the knit glove shells were exported from the United States, they were knit only to the extent that the knitting machines were capable of knitting on these particular styles. They were not in fact completely knit. It was left to the intensive labor, by hand, in Haiti to finish the fabrication process commenced in the United States.

The "tipping" operation is clearly a "further fabrication" because it actually *constructs* a portion of the glove that did not exist before, namely the fingertips. As described by Mr. Vandenberg, it is a manufacturing, construction or fabrication operation. Unlike the *General Instrument* cases, the "tipping" operation performed on the knit glove shells does not "assemble" or put together two components that are already made and completed. Rather, it completes one single component by creating something that did not exist before, that is, a fingertip, an indispensable part of the glove shell.

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The court does not agree that the use of the same material (yarn) that makes up the component (knit shell) to construct a further part or portion of that component is a mere "assembly." Before the "tipping" operation, the glove shell was incomplete *as a fabricated component.* It is only after the fingertips are manufactured, constructed or fabricated, with a continuation of the very yarn used to knit the glove shell, that the glove shell becomes a fabricated component.

Unlike the operations performed on the Z-beams in *Rudolph Miles* v. *United States*, 65 CCPA 32, 567 F. 2d 979 (1978), the "tipping" operation on the knit glove shells required a significant amount of labor. In the *Rudolph Miles* case, the operations performed abroad on the 55-foot steel Z-beams required 104 minutes of labor at a cost of $12, or about 3 percent of the value of the beam. In contrast, by plaintiff's own admission, the so-called tipping operation required 11 separate steps.

Mr. Vandenberg testified that it took approximately 30 seconds to "close" one fingertip, or 2½ minutes to close all the fingertips of one glove shell. However, in his demonstration of the "tipping" operation, Mr. Vandenberg required approximately 4 minutes to complete one fingertip. Even allowing for the one brief interruption, and the fact that Mr. Vandenberg was describing the process as he performed it, the discrepancy is substantial. Assuming, however, that the estimate of 30 seconds per finger, or 2½ minutes per glove, is correct, it is important to note that Mr. Vandenberg also testified that the knitting machines required approximately 5 minutes to knit one glove shell. The "tipping" operation, therefore, required half as much time as the knitting of the entire glove shell.

On the question of the cost of the "tipping" operation, the testimony of Mr. Anderson, plaintiff's treasurer and comptroller, is also enlightening. Although it is unclear whether Mr. Anderson was referring to the cost of performing the "tipping" operation in Wisconsin or in Haiti, it is nevertheless clear that the cost of performing the "tipping" operation in Haiti was a *significant* portion of the total cost of manufacturing the gloves. On cross-examination, in answer to the question "if it cost more money to close the fingertips on the pair of gloves in front of you than it cost to manufacture the knitted glove shell on the machine in Wisconsin," Mr. Anderson responded, "yes, it would." Mr. Anderson agreed that "the cost of the knitting operation of the entire glove shell is less than the cost of the operation of closing the fingers."

The evidence shows that the "tipping" operation must be completed as the next processing step after the knitting of the glove shell since without "tipping" the yarn would unravel during the brushing and steaming steps. As in the case of *The Rubberset Co.* v. *United States*, 73 Cust. Ct 107, 383 F. Supp. 1403 (1974), 'without this essential

processing the (material) as exported would not be capable of being assembled." 73 Cust. Ct. at 111, 383 F. Supp. at 1405. Furthermore, when viewed in relation to the entire manufacturing process of the gloves, the "tipping" operation, in the words of the *Rudolph Miles* case, constitutes a "substantial change or improvement." 567 F. 2d at 982.

Plaintiff, nevertheless, asserts that the "tipping" operation is more appropriately viewed as an act of assembly rather than as a "further fabrication."

It is common knowledge that "to assemble" means to fit or join components or parts together. "Assembly," in the present context, signifies the fitting or joining together of "finished" manufactured or fabricated parts or components. *Webster's Third New International Dictionary* (1966) defines an "assembly" to be:

> "5a: the act or process of building up a complete unit (as a motor vehicle) using parts already in themselves finished manufactured products * * *."

The word "assemble" is defined in *Webster's Third New International Dictionary* (1966) as follows:

> "2: to bring together: as—a: to put or join together usu. in an orderly way with logical selection or sequence * * * b: to fit together various parts of so as to make into an operative whole [*sic*] * * *."

The judicial interpretations of the word "assemble" closely follow the lexicographic definition, and acknowledge its importance. In *C. J. Tower & Sons of Buffalo, Inc.* v. *United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187 (1969), the court noted that:

> "[T]he framers of item 807.00 have used one form or another of the term 'assemble' with the same understanding of its scope as that imparted by contemporary lexicographers, namely, that the term is used to describe the joining or coming together of *solids*." (Italic in original.) 62 Cust. Ct. at 647, 304 F. Supp. at 1190.

In the case of *J. E. Bernard & Co.* v. *United States*, 57 CCPA 52, 420 F. 2d 1403 (1970), the Court of Customs and Patent Appeals considered the meaning of the word "assembly" as used in paragraph 368(c) of the Tariff Act of 1930. Despite the differing context, the court nevertheless quoted the lexicographic definitions of "assembly" and "assemble" and determined that "an assembly . . . results when two or more existing parts or pieces are joined together . . . ." 57 CCPA at 58, 420 F. 2d at 1407.

The Customs Regulations define assembly in terms of articles assembled abroad with United States components in section 10.12(b):

> "(b) *Assembly.* 'Assembly' means the fitting or joining together of fabricated components." 19 CFR 10.12(b).

It is apparent that the judicial and lexicographic definitions of "assembly," as well as the Customs Regulations, envision an assembly which requires finished manufactured or fabricated components which are "joined" together to form an article. Clearly, "assembly" does not include the manufacture, production or fabrication of the essential parts to be used in the assembly process.

In addition to the guidance provided by the decided cases, it is necessary constantly to recall the legislative policy expressed in the governing statute. The congressional allowance permitted by the statute is limited to products of the United States "*assembled abroad.*" The statutory language does not speak of "fabricated components," *complete* or *incomplete, finished* or *unfinished*. Such an interpretation would clearly do violence to clause (a) of item 807.00, TSUS, which expressly states "*ready* for assembly *without* further fabrication."

It is plaintiff's claim that the knit glove shell was a fabricated component when exported since no further knitting was performed after the machine had knit the glove shell. Plaintiff supports its assertion that the "tipping" operation is an assembly by drawing an analogy between the act of closing the fingertip with a length of yarn and a needle, and the sewing together of precut pieces of fabric, which is clearly an assembly.

Plaintiff places primary reliance on the case of *Baylis Brothers Co. v. United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA 9, 451 F. 2d 643 (1971). In the *Baylis Brothers* case, precut dress fronts were exported to be "smocked" and then returned. The dress fronts were fabricated in the United States by cutting fabric to a predetermined size and shape and stenciling a pattern of dots onto the fabric. The smocking was performed abroad by sewing thread through the stenciled dots to obtain shirrs or gatherings of the fabric. The smocking did not involve sewing the precut dress fronts onto other pieces of fabric, but rather the sewing gathered the fabric of the dress front to itself to create the shirrs. The smocked dress fronts were imported to be assembled into children's dresses in the United States. The court held this smocking operation to be an assembly of the dress front with the thread. In its reply brief, plaintiff asserts that the only "difference between the fabric and thread in the *Baylis* case and the fabric and yarn in this case, insofar as item 807.00, TSUS, is concerned is that in this matter the yarn must be cut prior to the sewing process."

The court does not agree because there is another, more important distinction between the *Baylis Brothers* case and the case at bar. In *Baylis Brothers* the fabric or component was completely fabricated. It not only required no cutting, but more important, it also required no further weaving prior to assembly. The operation merely sewed the

fabric in such a way as to create shirrs or "gathers." The dress fronts were completely fabricated before the "smocking" took place, and no new portion of the dress fronts was created by that operation. In contrast, the knit glove shells were not completely fabricated when exported from the United States. The "tipping" operation, rather than being an assembly process by sewing, was a further fabrication by a finishing or completion of the knitting that the knitting machine could not complete on these particular styles of gloves.

The knit glove shell becomes a fabricated component "in condition ready for assembly" only after the fingertips have been constructed. It is only after this manufacturing operation takes place that the glove shells become a fabricated component like the precut dress fronts in the *Baylis Brothers* case.

Furthermore, it is futile to stress the *Baylis Brothers* case as a controlling precedent when it merely involved the simple joining of thread to dress fronts following a predetermined pattern. Judge Baldwin, writing for the Court of Customs and Patent Appeals in the *Baylis* case, dismissed the issue of whether the precut dress fronts met the requirements of clause (a) of item 807.00, TSUS, by finding that "the smocking operation is well within the common meaning of the term 'assembly,' since the operation merely consists in joining the two components together according to the stenciled designs." 59 CCPA at 11, 451 F. 2d at 645. The issue that occupied the court's attention in *Baylis Brothers* was whether the components failed to meet the requirements of clause (b) of item 807.00, TSUS, by having changed in form, shape, or otherwise to such an extent as to have lost their physical identity.

The "tipping" operation is the completion or fabrication of the single major component of the knit gloves. Since the knit glove shells were not "finished manufactured products," they were not ready for "assembly" in the common or dictionary meaning of the word. Viewed in a statutory setting for purposes of the item 807.00, TSUS, allowance, they were not *fabricated* components *ready* for assembly *without* further fabrication. As stated in the *General Instrument Corp.* case, "classification under item 807.00 depends upon the relationship of the disputed element to the whole." 60 CCPA at 182, 480 F. 2d at 1405–06. Viewing the "tipping" operation in relation to the entire manufacturing process, it clearly constitutes a "further fabrication" of the knit glove shells and not an assembly of fabricated components.

That the "tipping" operation is a "further fabrication," and not an "assembly," may be demonstrated also by a comparison of the "tipping" operation to the process of sewing the precut palms onto the knit glove shells. The precut palms had holes punched in them where they were to be sewn onto the glove shells. The precut palms

required no further steps before assembly or joining with the glove shells. This operation was clearly an assembly of the type performed in the *Baylis Brothers* case. The Customs Service recognized sewing of the precut palms onto the completed knit glove shells as an act of assembly, and the allowance permitted by item 807.00, TSUS, was granted.

Nor can the "tipping" operation be construed to be a subassembly operation prior to final assembly with the precut palms. It is well recognized in customs law that an article is not precluded from item 807.00 allowance solely because it is subjected to a subassembly process prior to assembly. *Rudolph Miles* v. *United States*, 65 CCPA 32, 567 F. 2d 979 (1978); *General Instrument Corp.* v. *United States*, 60 CCPA 178, 480 F. 2d 1402 (1973). However, the subassembly process must itself be an assembly and not a further fabrication. For the same reasons that the "tipping" operation could not be an assembly process, it cannot be a subassembly process.

Requirements of clause (b) of item 807.00

Although defendant, in its answer, denied plaintiff's allegation that the knit glove shells did not lose their physical identity by change in form, shape or otherwise, it did not address this issue at the trial, or in its brief. The court agrees with plaintiff that, for purposes of clause (b) of item 807.00, TSUS, the knit glove shells had not "lost their physical identity . . . by change in form, shape, or otherwise" by reason of the "tipping" operation.

Physical changes in the article do not necessarily lead to a loss of "physical identity" within the meaning of clause (b) of item 807.00, TSUS. In the case of *United States* v. *Baylis Brothers Co.*, 59 CCPA 9, 12, 451 F. 2d 643, 646 (1971), the Court of Customs and Patent Appeals stated that:

> The legislative history makes it equally apparent, however, that Congress did not intend to exclude articles from item 807.00 merely because the American components had undergone some change of form or shape. The test specified in item 807.00 is whether the components have been changed in form, shape, or otherwise to such an extent that they have lost their *physical identity* in the assembled article. The term "*physical identity*" was used to exclude from item 807.00 those assembled articles whose American components are "chemical products, food ingredients, liquids, gases, powders," and the like. (Footnote omitted; italic in original.)

This physical identity test has been reiterated in two subsequent cases: *General Instrument Corp.* v. *United States*, 61 CCPA 86, 499 F. 2d 1318 (1974); *General Instrument Corp.* v. *United States*, 60 CCPA 178, 480 F. 2d 1402 (1973).

The "tipping" operation, although working a change in the form or shape of the knit glove shell, did not change the glove shells to such an extent that they lost their physical identity. The knit glove shells did not lose their physical identity by the completion of the fingertips. This may be seen from the exhibits submitted of the knit glove shells, which show the state of the glove shells before and after the "tipping" operation, and from various photographs which illustrate the "tipping" operation.

Requirements of clause (c) of item 807.00

In order to qualify for the claimed item 807.00, TSUS, allowance, clause (c) requires that the articles "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting." In the present action, the articles exported from the United States were clearly "advanced in value or improved in condition" by the various operations performed in Haiti.

For the reasons discussed under clause (a), the "tipping" of the glove shells was a "further fabrication," and not an act of assembly. For the reasons that follow, it was not an operation incidental to the assembly of the precut palms to the knit glove shells.

Any doubt as to the type of operation that Congress intended to be considered "incidental to the assembly process" is resolved by the applicable legislative history in H. Rept. No. 342, 89th Cong., 1st Sess. 48–49 (1965), accompanying H.R. 7969 (subsequently enacted as the Tariff Schedules Technical Amendments Act of 1965, Public Law 89–241), which stated that:

> It appears that under the language of item 807.00 minor operations such as painting incidental to assembly abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers.
>
> Section 72 of the bill would amend item 807.00 so that it would apply to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.
>
> * * * * * * *
>
> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved *"by operations incidental to the assembly process such as cleaning, lubricating, and painting."* It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or other-

> wise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad. (Italic added.)

The language of clause (c) states categorically that for the statutory allowance to be granted, the U.S. components must "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process." To facilitate interpretation and to remove doubt as to the operations that were deemed "incidental to the assembly process," the statute gave as specific examples operations "such as *cleaning, lubricating,* and *painting.*" (Italic added.)

Completing the fingertips of the knit glove shells is clearly not *ejusdem generis* with "cleaning, lubricating, and painting." Certainly, it is not of a "minor nature" as contemplated by the House report.

In the *Rudolph Miles* case, the burning of holes and slots in the steel Z-beams was found to be a change of a minor or insubstantial nature *in relation to the massive, 55-foot steel Z-beam.* In contrast, the "tipping" operat on on the knit glove shells cannot be considered as *incidental* The testimony of plaintiff's witnesses, showed the complexity and importance of the "tipping" operation in relation to the entire fabrication or manufacturing process. The "tipping" operation was a critical step prior to assembly of the precut palms with the knit glove shells. The fingertips had to be closed before the glove shells were brushed, steamed, and shaped. Furthermore, the "tipping" operation consisted of 11 steps requiring approximately half as much time to complete as the knitting machine required to knit the entire glove shell. Moreover, the cost of completing the fingertips constituted a substantial part of the cost of the completed glove.

In *United States* v. *Texas Instruments Inc.*, 64 CCPA 24, 545 F. 2d 739 (1976), the scoring and breaking of a silicon slice along provided "streets," to separate the individual transistor areas that had been commonly created on the slice, was determined to be an operation incidental to the assembly process. Basing its decision on the *General Instrument* cases discussed under clause (a) the appellate court noted that "[t]he transistor chips themselves are unchanged after the scoring and breaking operation; they are merely separated, as the wire and foil were separated from the supply spools in the prior [*General Instrument*] cases." 64 CCPA at 30, 545 F. 2d at 743–44.

Unlike the transistor chips in the *Texas Instruments* case, the knit glove shells in this action are substantially advanced in value or improved in condition after the "tipping" operation. That operation created something new that did not exist before, viz. fingertips for the glove shell, thereby completing the knit glove shell component.

Unlike the scoring and breaking of the silicon slice in the *Texas Instruments* case, the "tipping" operation is not "incidental to the assembly process."

The conclusion that the "tipping" operation is not an operation "incidental to the assembly process" is supported by comparison of the "tipping" operation to the brushing, tumbling, steaming, and shaping steps that the glove shells underwent prior to assembly with the precut palms. The brushing operation consisted of turning the gloves inside out and passing them between two rotating wire brushes. After brushing, the glove shells were placed in a large dryer for tumbling. The glove shells were next placed on wire forms and passed through a steam tunnel for shaping. These operations are of the type of *minor* operations contemplated by Congress, and are *incidental* to the assembly of the glove shell with the precut palms. They leave the glove shell essentially unchanged. Without these steps, the gloves, when assembled, would still be wearable. In the absence of the "tipping" operation, the gloves would be incomplete, unfinished, and not usable.

In order to prevail in this action, plaintiff was required to prove that the knit glove shells, and the separate yarn float in one entry, "were exported in condition ready for assembly without further fabrication" and has "not lost their physical identity in such articles by change in form, shape, or otherwise." Plaintiff was also required to establish that the knit glove shells had "not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting." Plaintiff has failed to bear all three elements of its burden of proof.

Upon all the evidence of record, it is the determination of the court that the plaintiff, notwithstanding the able presentation of its case, has not succeeded in rebutting the presumption of correctness as to clauses (a) and (c) of item 807.00, TSUS. Having failed to establish compliance with the requirements stated in clauses (a) and (c), plaintiff is not entitled to the duty allowance claimed under item 807.00 of the tariff schedules.

Judgment will be entered accordingly.

(C.D. 4787)

ENDICOTT JOHNSON CORPORATION *v.* UNITED STATES

Footwear—Ornamented

Cotton canvas shoe uppers held properly classifiable under item 386.50 of the tariff schedules as articles of textile materials, nspf, not ornamented, as claimed by plaintiff since the arch stitching thereon is not ornamental.

Court No. 75-7-01897

Port of New York

[Judgment for plaintiff.]

(Decided February 1, 1979)

Rode & Qualey (*John S. Rode, Michael S. O'Rourke* and *Patrick D. Gill* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Madeline B. Cohen*, trial attorney), for the defendant.

MALETZ, Judge: In this case the court is called upon to determine the proper tariff classification of certain cotton canvas shoe uppers that were exported from Japan in 1972 and entered at the port of New York during the same year. Upon entry, the merchandise, described on the invoices as "Canvas Shoe Uppers," was classified by the government under item 380.00 of the Tariff Schedules of the United States (TSUS) as "* * * other men's or boys' wearing apparel, ornamented: Of cotton" and assessed with duty at the rate of 35 percent ad valorem.

At trial, defendant abandoned its classification under item 380.00 [1] and now asserts that the merchandise is properly classifiable under item 386.04 as "Articles not specially provided for, of textile materials: * * * other articles *ornamented:* Of cotton," dutiable at the rate of 40 percent ad valorem. (Italic added.)

Plaintiff claims the merchandise is properly classifiable under item 386.50 as "Articles not specially provided for, of textile materials: * * * Other articles, *not ornamented:* Of cotton: * * * Other," subject to duty at the rate of 14 percent ad valorem. (Italic added.)

The sole question before the court is whether the two parallel rows of stitching on each side of the imported uppers known as "arch stitching" are or are not ornamental.

The pertinent provisions of TSUS read as follows:

Schedule 3 Headnotes:

* * * * * * *

3. For the purposes of the tariff schedules—

(a) the term "*ornamented*", as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

(i) fibers, filaments (including tinsel wire and lame), yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including—

* * * * * * *

[1] Defendant abandoned its classification under item 380.00 (as well as its alternative claim under item 382.00 covering women's or girls' wearing apparel) in view of the decision in *The Westminster Corp. v. United States*, 78 Cust. Ct. 22, C.D. 4687, 432 F. Supp. 1055 (1977). In that case, the court held that certain vinyl uppers which were classified as wearing apparel and claimed to be classifiable as footwear could not be classified under either provision since the provisions in the tariff schedules for wearing apparel and footwear do not contain a "parts" provision.

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

* * * * * * *

Schedule 3, Part 7, Subpart B:

Subpart B headnote:

1. This subpart covers articles, of textile materials, not covered elsewhere in the tariff schedules.

	Articles not specially provided for, of textile materials:	
[Defendant's claim]		
	Lace or net articles, whether or not ornamented, and other articles ornamented:	
386.04	Of cotton	40% ad val.
	* * * * * * *	
[Plaintiff's claim]		
	Other articles, not ornamented:	
	Of cotton:	
	* * * * * * *	
386.50	Other	14% ad val.

The Record

The record in the case consists of a stipulation of fact, the testimony of 3 witnesses and 15 exhibits for the plaintiff, and 3 witnesses and 10 exhibits for the defendant.[2]

Description of the Imported Merchandise

The imported merchandise consists (as previously indicated) of cotton canvas shoe uppers. These uppers were of both oxford (low-cut) and high top types and came in white and black colors in different sizes. After importation, soles were attached to the uppers, insoles and laces were inserted, and the merchandise was thereby made into sneakers.

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[2] The witnesses for plaintiff were: (1) Richard Oris, general manager of quality assurance for the plaintiff, Endicott Johnson Corp., who was responsible for all inspection and testing at the plaintiff's seven shoe manufacturing plants; (2) Harold McGowan, president of the plaintiff, who was responsible for introducing the imported merchandise into the United States; and (3) John Galli, an employee of plaintiff, who was in charge of operations for plaintiff's W. T. Grant Co. account during the period here in issue when the uppers at bar were incorporated into basketball sneakers plaintiff manufactured and sold to the W. T. Grant chain.

The witnesses for the defendant were: (1) Robert Chase, division manager of quality assurance for Uniroyal, Inc.—a footwear manufacturer—who was in charge of his company's testing laboratories and responsible for its return goods policy; (2) Dan McCarthy, manager of product development of the Converse Rubber Co.—one of the largest manufacturers of footwear in the United States; and (3) Dr. Clifton Scaggs, a podiatrist.

The uppers contained two parallel rows of stitching extending from eyelets closest to the ankle of the wearer downward at a slight angle to the midpoint of the arch area. These two parallel rows of stitching are referred to in the trade as "arch stitching" and, as noted before, the sole question before the court is whether or not this arch stitching—which is depicted below—is ornamental.

Tests to Determine Strength of Uppers With and Without Arch Stitching

Samples of the imported uppers were tested both by plaintiff and by the Uniroyal Co. for the defendant on a Scott Tester machine to demonstrate by the so-called grab method the comparative tensile strength of the imported uppers with and without the arch stitching. On the tests conducted by plaintiff, the portions of the uppers *without* arch stitching broke on the average at 64 pounds pressure, while the portions of the uppers with the arch stitching broke on the average at 102 pounds pressure. On the tests conducted for the defendant by Uniroyal, the portions of the uppers *without* arch stitching broke on the average at 70 pounds pressure, while the portions of the uppers *with* the arch stitching broke on the average at 90 pounds pressure. The conclusion drawn from defendant's tests as stated in a laboratory test report by Uniroyal was that: "The average strength at ultimate break is less on the * * * [uppers] without [arch] stitching than on the * * * [uppers] with [arch] stitching." (R. 338) [3]

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[3] There is a Federal test for determining the breaking strength of a woven fabric by the grab method, i.e., Federal Test Method Standard No. 191, Method 5100. The record shows that that test method was not and could not be used in testing the uppers involved here because (1) the amount of fabric in the uppers is insufficient to comply with the Federal test requirements; and (2) the arch stitching is on the bias and is thus not measurable by the Federal test method since that method measures the strength of the warp and filling yarns.

It is to be added that a method of testing the *wearability* of an article in actual use is by wear tests in which the articles are issued to a group of persons who wear them in a variety of use conditions. Such wear tests are a way of determining the article's serviceability, comfort and consumer acceptability. The record indicates that plaintiff did not conduct wear tests on the sneakers in which the imported uppers were incorporated: the reason ascribed was that plaintiff does not conduct wear tests to determine the strength of fabrics.

Testimony With Respect to Whether or not the Arch Stitching is Ornamental

We summarize now the testimony in the record bearing on whether or not the arch stitching is ornamental. Plaintiff's first witness to testify on this aspect was its president, Mr. McGowan.

Mr. McGowan testified that he was responsible for introducing the merchandise in question into this country. This came about, he said, as a result of an agreement between plaintiff and the W. T. Grant Co. under which that company agreed to purchase from plaintiff, over a period of years, some 30 million pairs of sneakers utilizing the uppers in question. To carry out this agreement, the witness stated that plaintiff had to design an upper which would be suitable for a long-lasting PVC sole and which would at the same time be inexpensive enough so that the resultant pair of sneakers could meet Grant's retail price requirement of $2.99. Mr. McGowan stated that the strongest type of material for the uppers was army duck but this was far too expensive for the $2.99 retail price requirement since it would cost 25 cents a pair more than the material actually used. Thus, instead of using army duck, plaintiff utilized a 160-drill cloth with a web backing. Mr. McGowan testified that the arch stitching was added to this material—at a cost of 2½ cents per pair—to reinforce that point of the sneaker which gets the most pressure when the shoe is laced. According to the witness, the use of arch stitching by plaintiff goes back to 1937. He added that the stitches were put on the uppers to achieve "additional strength in that particular area of the shoe, which is called the arch area." (R. 167)

Continuing, Mr. McGowan testified that on the basis of his experience in the footwear industry, the arch stitching—which is white—does not serve to decorate or adorn the merchandise. According to the witness, in order for something to be ornamental or decorative, it must be readily visible. In this connection, he stated that 80 percent of the sneakers in issue were white with white stitching and since the arch stitching was also white, it was not visible unless one was very close to it. Under these circumstances, he concluded that the stitching could not be considered ornamental or decorative. He further stated that while the white arch stitching could be seen on the black sneaker, in that case it was no more decorative than the other white stitching on the shoe—which stitching is concededly nonornamental.

Mr. McGowan further testified that the arch stitching in issue was not considered ornamental by the buying public. This fact, he said, caused plaintiff to discontinue producing the item since ornamental shoes "like the Adidas shoes and Pumas and the different types of shoes with red stripes and red stitching" took over the market. (R. 169)

On cross-examination, the witness stated that he did not believe that the white arch stitching gave the sneaker "a more expensive or

classier look" (R. 222), particularly since the arch stitching on the white sneaker which represented 80 percent of the production was not very noticeable. On further cross-examination, he expressed the opinion that some customers would purchase a sneaker with arch stitching rather than one without arch stitching not on the basis that the arch stitching was ornamental, but on the basis that the arch stitching made the sneaker stronger. Finally, on this aspect, a tie-on tag attached to every pair of sneakers using the imported uppers sold by W. T. Grant contained the notation: "Arch Stitching Insures Upper Strength."

Another witness for plaintiff, John Galli, an employee of plaintiff since 1964, has been engaged in large-scale selling to customers such as W. T. Grant and has traveled throughout the United States to observe the retail market on a firsthand basis. As a result of his marketing background, Mr. Galli defined the term "ornamented" as used in the footwear industry as referring to something affixed to a shoe that has no utilitarian function. He testified that if stitching were primarily decorative and only incidentally utilitarian, the trade would still consider it utilitarian. The witness testified, however, that if the stitches were placed on a sneaker "primarily to enhance the appearance and to attract a customer," despite the fact that the stitches might incidentally make the upper stronger, he would consider the stitches to be decorative "if that was the intention." (R. 250) Finally, the witness testified that the arch stitching on the imported uppers was "definitely not decorative."

Defendant's first witness was Robert Chase, who as previously mentioned (note 2, supra) was division manager of quality assurance for Uniroyal in which capacity he was in charge of that company's testing laboratories and responsible for its return goods policy. Mr. Chase supervised the tests conducted by Uniroyal for the defendant to determine the strength of the uppers in issue with and without arch stitching and testified that "[i]n all instances * * * the stitched upper, had a strength in excess of the unstitched sample * * *." (R. 385) In his opinion, however, the arch stitching on the imported uppers served absolutely no utilitarian function and was placed on the upper for attractiveness or style. He testified that the arch stitching was for decorative purposes only because it did not join two parts together as did the remaining stitching on the imported uppers, which stitching he did not consider to be decorative. He stated that in order for something to be decorative it need only be visible to someone —primarily the purchaser or the wearer—but conceded that this was his "opinion at the moment" and that his opinion was not necessarily shared by the industry. (R. 309)

Mr. Chase further testified that, in his experience reviewing returned merchandise, he has not found abrasion of the arch area to be

any problem whatever with sneakers. He was also of the opinion that decorative stitches do not always have to be in contrasting colors. He then went on to emphasize that the arch stitching on the imported uppers "simulates an additional reinforcement on the shoe, which, in fact, does not exist." (R. 368)

Finally, Mr. Chase agreed that forces are exerted in the area where the arch stitching is sewn and that if he wished to make an upper "more strong" he would place stitches in such an area. (R. 372)

Defendant's second witness, Dan McCarthy, manager of product development of the Converse Rubber Co., testified that stitching which joined two pieces of material together was utilitarian while stitching which did not join two pieces of material together was decorative. In the witness' opinion, the arch stitching found on the imported uppers was ornamental or decorative.

Mr. McCarthy added on cross-examination that sneakers are not ordinarily reinforced in the arch area; that the arch stitching simulates an extra piece of fabric; that in the past sneakers were made with such an extra piece of fabric on the inside for purposes of an "instep reinforcement" which added support to the instep; and that the industry at one time believed there was a need to reinforce the instep area and for that purpose placed strips inside the upper. Mr. McCarthy then testified that in some cases it is still necessary to support the arch or instep area.

The witness further stated that his company had made sneakers which had arch stitching similar to that here; that this stitching was purely ornamental and was added to make the sneaker more attractive; and that his company had never claimed in its advertising that the arch stitching had a utilitarian function of making the upper stronger.

Mr. McCarthy testified that in order for stitching to be decorative, it did not have to be visible to anyone but the purchaser or wearer. He added that ornamental or decorative stitching did not have to be in a contrasting color, but could be in the same color as the shoe. Mr. McCarthy explained that white stitching was used for ornamentation on white canvas sneakers because nonwhite stitching on an all white sneaker would detract from the eye appeal. Nonwhite stitching, he said, would cheapen the appearance of the shoe by giving it a gaudy, blatant appearance, making it less "balanced." Since balancing is an important consideration in designing sneakers, Mr. McCarthy stated that white stitching is used for ornamentation on white sneakers since it would not be consistent with the overall design or motif of the sneaker to use thread of a different color. He explained that sneakers are designed to appeal to the consumer and that, in a shoe store, white stitching on a white canvas would be readily visible to the consumer.

Defendant's final witness was Dr. Clifton Scaggs, a podiatrist who indicated that a podiatrist is a licensed specialist in the medical, surgical, and orthopedic management of the human foot. Dr. Scaggs testified that the major weight-bearing portions of the foot are the ball and the heel and that the arch area of the normal foot does not bear weight in the gait cycle. He expressed the opinion that uniform arch supports found in some shoes have no utilitarian function. On cross-examination, he conceded that force was necessarily applied to the arch area of the shoe simply by putting a shoe on.

The Law

As set out before, the single issue in this case is whether or not the arch stitching is ornamental. For the reasons that follow, it is concluded that plaintiff has proven by a preponderance of the credible evidence that the stitching in question is primarily functional and not ornamental.[4]

The Arch Stitching Is Functional

Headnote 3(a)(i)(B) to schedule 3, TSUS, specifically excludes functional stitching from the term "ornamented." See, e.g., *The Baylis Brothers, Inc.* v. *United States*, 60 Cust. Ct. 336, 339, C.D. 3383, 282 F. Supp. 791, 794 (1968), *aff'd*, 56 CCPA 115, C.A.D. 964, 416 F. 2d 1383 (1969).

The word "functional" is defined in Webster's New International Dictionary (2d ed., 1956), as follows:

> *functional* 1. Of, pertaining to, or connected with a function or functions; * * *. 2. Performing or serving a function, as a useful purpose or special activity; designed, developed, considered, etc., with reference to a function or functioning; * * *.

With these considerations in mind, the record establishes that the arch stitching in question performs the function of adding strength to the arch area of the upper. This is demonstrated by the tests of the imported uppers which make manifest that the uppers with the arch stitching were measurably stronger than the uppers without that stitching.

The record is equally clear that plaintiff caused arch stitching to be placed on each upper for the purpose of adding strength to the upper. As explained by Mr. McGowan, who was responsible for introducing the merchandise into this country, plaintiff chose to present to the public an upper which derived its added strength from the arch stitching rather than to make the upper out of unduly expensive army duck.

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[4] In reaching this conclusion, the court assumes arguendo that the doctrine of *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970), is applicable here. Accordingly, by virtue of the Government's original classification, the arch stitching in issue is presumed to be ornamental and it thus became plaintiff's burden to prove that the arch stitching is functional and not ornamental.

Illustrative of how plaintiff's purpose was made known to the public is the tie-on tag containing the notation "Arch Stitching Insures Upper Strength" which was placed on every pair of W. T. Grant sneakers made with the imported uppers. In this connection, the term "purpose" is used in the same sense as in *The Baylis Brothers, Inc.* v. *United States, supra*, 60 Cust. Ct. at 341:

> We agree that in determining whether the dresses are ornamented, the evidentiary issue, as stated above, is whether the primary purpose of the stitching is for decoration rather than utility. The term "purpose" as used here, as well as in the decisions cited above, must, of course, be understood to mean function rather than the subjective intent of the manufacturers. It is the resultant effect of, and not the claimed motivation for, the stitching which determines the issue.

Here, the "claimed motivation" and the "resultant effect" converge. The "claimed motivation"—offering the public a better all-around sneaker having a strengthened upper has been shown by the testimony of Mr. McGowan, the person who started the program. The "resultant effect" of arch stitching—greater strength—was demonstrated by both parties' tests.

Indeed, plaintiff's stated purpose for adding arch stitching to the uppers was supported by the following testimony on cross-examination of defendant's witness, Mr. McCarthy (R. 458):

> Q. So at one time, apparently, there was a need, or the industry felt there was a need to reinforce the instep area and, in fact, did place strips inside the upper, is that correct?—A. Correct.
>
> Q. Is it your testimony then, that while in the past the industry felt it was necessary to support the arch area or the instep area, it is no longer so necessary?—A. No.
>
> Q. Then there is a necessity to support that area?—A. In some cases.[5]

Thus, the testimony of record establishes that the arch stitching in issue was employed in order to manufacture a stronger upper and was used in lieu of heavier duck material which would have been too expensive. To that extent, the stitching clearly performs a functional purpos , which satisfies the literal language of headnote 3(a)(i)(B), and also responds to the more stringent test enunciated in *The Baylis Brothers, Inc.* v. *United States, supra*, i.e., the stitching is primarily functional rather than primarily decorative. By strengthening the fabric of which the uppers were made, the arch support stitching permitted the plaintiff to substitute a lower cost fabric and thereby reduce the cost of the footwear ultimately produced from the imported uppers. Clearly, achieving an economic benefit by using arch support

[5] It is to be noted that on redirect examination Mr. McCarthy testified that he did not think it necessary to reinforce the instep area in a canvas sneaker. (R. 471)

stitching cannot be characterized as an "ornamental" or "decorative" purpose.

Defendant, however, interjects a test of necessity, rather than functionality, as the decisive criterion in determining whether the stitching in question constitutes ornamentation. The essence of defendant's argument contained in its brief is as follows (br., p. 32):

> * * * It is clear that the "arch stitching" is not a necessary portion of either the upper or the sneaker without which there would be no upper or no sneaker, nor is the upper or sneaker incomplete and unfit for the purpose for which it was designed and intended to be used without the "arch stitching." * * *

It is a generally established principle that stitching which is "necessary" to the completion of a garment will "conclusively" establish that the stitching is functional. *Blairmore Knitwear Corp. et al.* v. *United States*, 60 Cust. Ct. 388, C.D. 3396, 284 F. Supp. 315 (1968). However, defendant confuses the conclusiveness of necessity under the statutory test of "functionality" with the test of functionality itself. For, under defendant's reasoning, a shirt with pockets would be considered ornamented by virtue of the pockets alone because pockets are unnecessary for a shirt to function as a shirt. There is a basic difficulty with this reasoning, however, since the question is not whether the "upper" is functional with or without the stitching but whether the "stitching" is functional. Thus, defendant is incorrect in its assertion that the question of utility, and hence the functionality, of the stitching "depends upon its necessity." Brief, p. 5.

In short, the facts unequivocally established by the tests performed for both parties prove that arch stitching makes the fabric of the upper stronger and hence results in a stronger shoe. Furthermore, according to the witnesses responsible for the design of the shoe in issue, this was the purpose for which the arch stitching was employed.

It is also interesting to note that the Customs Service, in several published Treasury decisions, has ruled that portions of a garment which simulate a functional element of the garment do not "ornament" that garment. For example, dummy or false pocket flaps which were sewn on each side at the waistline, which flaps simulate a flap that actually would cover each pocket and which were not more decorative than a utilitarian flap were held to be not ornamental. 100 T.D. 221, 232, T.D. 56410(46) (1965). Further, simulated pockets and belt segments (100 T.D. 802, 838, T.D. 56535(168) (1965)) and eight metal buttons sewn to the front of a woman's sleeveless dress to simulate a double-breasted effect (4 CUSTOMS BULLETIN 93, 96, T.D. 70–43(15) (1970)) did not cause the garment on which each of these simulated utilitarian embellishments was placed to be ornamental.

In line with these Treasury decisions, it is to be observed that quite apart from the fact that the record establishes that the arch stitching strengthens the imported uppers, defendant's witnesses themselves have reiterated that that stitching simulates functional stitches.[6]

The Arch Stitching is not Ornamental

It is also concluded that the arch stitching is not ornamental within the meaning of that term as set forth in headnote 3(a)(i)(B) to schedule 3, TSUS. With regard to this headnote, the court stated in *Blairmore Knitwear Corp.* v. *United States*, *supra*, 60 Cust. Ct. at 392–3:

> * * * [W]hile the Headnote * * * purports to define the term "ornamented", it does not actually do so. Instead it sets forth the circumstances under which fabrics and articles may be considered to be ornamented, and the types of embellishments which may accomplish that effect. As is evidenced by the introductory language, the emphasis is upon the article to be adorned or embellished, not the substantive matter of what constitutes ornamentation in the first instance.
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> * * * * * * *
>
> *The intent to make adornment the primary objective of ornamentation is thus evidenced.*—It is clear both by this express statement and the exclusion in headnote 3(a), *supra*, of "functional stitching" that, in employing the word "ornamented", Congress did not attempt to label all braid, or all fringe, or all edging, for example, ornamentation, but only such as in fact served to provide a decorative effect.
>
> * * * * * * *
>
> Moreover, a distinction must be drawn between that which finishes, joins, serves a utilitarian purpose, and only incidentally ornaments, and that which primarily adorns, embellishes, or ornaments. [Italic added.][7]

As the court stated in *Colonial Corp. of America* v. *United States*, 62 Cust. Ct. 502, 504–5, C.D. 3815 (1969):

> * * * The general rule is that whether or not an article is "ornamented" or "decorated" is a question of fact to be determined with reference to the particular article before the court. * * * It is the results produced upon the article, and not the method of production, which determines the classification. * * * Thus the important question is not what is the particular article being ornamented, but rather what is the effect on that article when some additional and nonfunctional feature is added to it.

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[6] Thus, defendant's witness, Mr. McCarthy, testified that the arch stitching simulates an extra piece of fabric on the inside which in the past was an instep reinforcement designed to provide support to the arch. (R. 457–8.) To similar effect, defendant's witness Mr. Chase testified that the arch stitching on the imported uppers "simulates an additional reinforcement on the shoe, which, in fact, does not exist." (R. 368)

[7] Webster's New International Dictionary (2d ed., 1956) defines ornament as follows:

2a. That which is added to embellish or adorn; that which adds grace or beauty; an embellishment, a decoration.

* * * * * * *

4. Addition or inclusion of anything that beautifies; ornamentation; embellishment; decoration.

It thus remains a question of fact as to whether or not the primary effect of the arch stitching is that of adornment or decoration. And reviewing the record before us in that light, it must be concluded that adornment or decoration is not the arch stitching's primary effect. Significant in this respect is Mr. McGowan's testimony that 80 percent of the sneakers in issue were white with white arch stitching and that since the arch stitching was also white, it was not readily visible. Examination of the sample supports this testimony. Furthermore, although the white arch stitching is readily visible on the black sneakers, its decorative effect is minimal because it is virtually identical in appearance to the other stitching on the upper, which is concededly nonornamental. In fact, defendant's witness Mr. McCarthy agreed that the arch stitching on the upper is "consistent with the overall design or motif of the upper." (R. 459)

It is to be added that defendant's two witnesses testified that, in their opinion, the arch stitching on the imported upper was ornamental and not functional. Their views were based on a belief that in order to be functional, stitching must hold or bind two pieces of material together. However, as we have previously seen, this simply does not conform with the meaning of "functional" as applied to the facts of this case.

In summary, the merchandise is not "ornamented" because arch stitching is not ornamental. A visual inspection of the uppers in issue reveals that the arch stitches are not more visible or decorative or colorful that the other stitches on the uppers. And even if the utility of arch stitching had not been shown, it is clear from the cases which have treated the ornamentation issue that because arch stitching does not adorn or embellish the upper in a commercially meaningful manner, the stitch is not ornamental.

For example, in *United States* v. *Mutual China Co. et al.*, 9 Ct. Cust. Appls. 232, T.D. 38202 (1919), the court held that embossed configurations on certain crockery articles had not been brought to that degree of embellishment as to be "ornamented" or "decorated" within the statute. As the court stated: "Certainly neither every deviated line nor undulated surface can be said to be an ornamentation or decoration, although pleasing to the eye." Id. at 234.

Further, in *Will & Baumer Candle Co., Inc.* v. *United States*, 21 Cust. Ct. 149, C.D. 1146 (1948), the court held that three vertical lines on a glass receptacle (holding a candle used in connection with a sanctuary lamp) were not ornamental since they were not "substantial and sufficient to amount to an ornament or decoration." Id. at 152.

Clearly distinguishable is *Colonial Corp. of America* v. *United States*, *supra*, 62 Cust. Ct. 502, where a double row of nonfunctional reddish stitching placed on the back of girls' blue denim shorts was found to

be ornamental. In that case, the stitching was eye catching; was conspicuous; and, even from a view of the sample, was obviously decorative. In the present case, by contrast, the arch stitching is not eye catching; is not conspicuous; and is not obviously decorative.

Conclusion

For the foregoing reasons, the court concludes that the imported uppers are, as claimed by plaintiff, properly classifiable under item 386.50 as "Articles not specially provided for, of textile materials: * * * Other articles, not ornamented: Of cotton: * * * Other," dutiable at the rate of 14 percent ad valorem. Judgment will be entered accordingly.

(C.D. 4788)

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC., LIBBEY-OWENS-FORD COMPANY, AND C E GLASS *v.* UNITED STATES

Float glass—Countervailing duties

"BOUNTY" OR "GRANT"

Where various types of government financial assistance have been extended by a foreign country, *viz.* Great Britain, to undeveloped regions of that country for generally political, policymaking and economic reasons not conditioned upon exportation, the Secretary of the Treasury's decision that no "bounty" or "grant" has been paid or bestowed upon an article or merchandise imported into this country was upheld.

WIDE DISCRETION—SECRETARY'S DECISION

The Secretary of the Treasury has wide discretion in determining what acts of foreign governments confer bounties or grants. *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971); *United States* v. *Zenith Radio Corporation*, 64 CCPA 130, C.A.D. 1195 (1977), *aff'd*, 437 U.S. 443 (1978).

COUNTERVAILING DUTY

When the determination has been made that no bounty or grant has been paid or bestowed, directly or indirectly, upon the manufacture, production or export of any article, within the meaning of section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974, then no countervailing duty will be levied.

Court No. 76-3-00642

[Plaintiffs' motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Decided February 6, 1979)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Joseph I. Liebman*, *John J. Mahon* and *Sidney N. Weiss*, trial attorneys), for the defendant.

Pilkington Brothers, Limited (*Charles W. Smith*, attorney; *Morgan, Lewis & Bockius* of counsel) as *amicus curiae*.

LANDIS, Judge: This case raises the question of whether various forms of government financed regional development programs instituted by Great Britain come within the provisions of section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974.[1] The statute provides:

> (1) Whenever any country * * * shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country * * * then upon the importation of such article or merchandise into the United States * * * there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed * * * a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

It is the holding of this court that these programs do not come within the purview of the statute.

This case comes here by motion and cross-motion for summary judgment pursuant to rules 4.12 and 8.2 of this court. The facts are undisputed as they relate to the decision.

Plaintiffs,[2] who are domestic manufacturers and wholesalers of float glass, informed the Commissioner of Customs by petition, pursuant to section 303(a) of the Tariff Act of 1930, as amended supra, that certain bounties or grants were being paid upon the manufacture or production of float glass in the United Kingdom or upon exportation. The Department of the Treasury conducted an investigation and published in 1975 a "Notice of Preliminary Countervailing Duty Determination" in the Federal Register, in part as follows (40 F.R. 27499):

> British Government officials have advised the Treasury Department that the regional development programs have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions. They have produced evidence that assistance given is available to all industries within the regional development areas and is in no way conditioned upon exports. Based on 1974 production figures for United Kingdom float glass, 26 percent of all such production was exported, and a small percentage of this amount was exported to the United States. The amount of assistance provided by the regional incentive programs was less than 1 percent of the value of the float glass sold.

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[1] 88 Stat. 1978, 2049 (1975), 19 U.S.C. 1303(a) (supp. V 1975).

[2] The plaintiffs are: ASG Industries, Inc., PPG Industries, Inc., Libbey-Owens-Ford Co., and C E Glass.

It was concluded by the Department of the Treasury that no bounty or grant was being paid.

Thereafter a notice of "Final Countervailing Duty Determination" was published in the Federal Register, in part as follows (40 F.R. 59227):

> After consideration of all information received, a final determination is hereby made, that, for the reasons stated in the preliminary determination, no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacture, production or exportation of float glass from the United Kingdom.

Subsequently, in 1977 an "Amendment of Notice of Preliminary Countervailing Duty Determination" was published in the Federal Register, in part as follows (42 F.R. 20525):

> The information obtained during the investigation conducted was recently reviewed and it is deemed appropriate, for the purposes of accuracy, to correct the last sentence of paragraph three of the preliminary determination to read as follows:
>
> > The amount of assistance provided by the regional incentive programs was slightly over 1 percent of the value [the exact amount is less than two percent, but is not stated in order to protect confidential commercial information] of the float glass sold.
>
> This correction in no way affects the final negative countervailing duty determination issued previously in this case.

Plaintiffs, pursuant to section 516(d) of the Tariff Act of 1930, as amended by section 321(f) of the Trade Act of 1974,[3] served notice of intention to contest the negative determination and filed summons in this court.

The facts surrounding the alleged bounties or grants in this case are deemed to be material and will now be discussed.

The benefits were received by Pilkington Brothers, Ltd. (hereinafter referred to as "P.B.L."),[4] the only float glass producer in the United Kingdom. P.B.L., in one name or another, had since the year 1826 manufactured a variety of glass products.

Between the late 1950's and the early 1970's, P.B.L. constructed four float glass "lines" or plants to replace the facilities used pre-

[3] (d) Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.
Within 30 days after a determination by the Secretary—
(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or
(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,
an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination. [88 Stat. 1978, 2048 (1975), 19 U.S.C. 1516(d) (Supp. V 1975).]

[4] P.B.L. filed a brief as amicus curiae.

viously. The production plants all were located at St. Helens, county of Merseyside, a depressed economic area, designated as a "development area" so as to qualify for regional economic assistance. The area was later designated as a "special development area" and Great Britain paid as much as 22 percent of the cost of the buildings, plant, and machinery and the repair thereon and during the years from 1967 to 1974 had expended a total of approximately 5 million pounds thereon.

The various reasons for the extending of government assistance were generally political, policymaking, and economic in nature and are too numerous to mention in detail, but in none of them was eligibility conditioned upon the amount of exportation. In all of P.B.L.'s production for 1974, approximately 26 percent was exported and only a small percentage of this amount was exported to the United States. The amount of assistance provided by the Government programs was between 1 and 2 percent of the value of the float glass sold. Both parties concur that the amount of benefit was more than *de minimis*. All the grants were cash payments.[5]

Plaintiffs contend, in the light of *Downs* v. *United States*, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), that any aid received by a foreign manufacturer, in more than *de minimis* amounts, is a bounty or grant for purposes of section 303(a) of the Tariff Act of 1930, as amended, 19 U.S.C. 1303(a). Defendant, on the other hand, cites the statute as to the presumption of correctness [6] and traces the history of bounties and grants in a number of European nations. Defendant argues that the legislative history of the countervailing duty statute demonstrates that only those programs which distort international trade (or promote exports) were intended to be reached by the statute and that Congress left for the Secretary of the Treasury the determination as to which programs constituted a bounty or grant within the meaning of the act.

As stated by the Court of Customs and Patent Appeals in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, 137, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971): "* * * In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres."

These judgments have been left to the Secretary, and as the Court further states at page 139: "There can be no doubt that the Secretary is under a legal duty to assess countervailing duties if he sees a bounty or grant being paid, and we think he does and must exercise some

[5] At a preliminary hearing on or about Feb. 15, 1977, the court considered the contentions of the parties and entered appropriate orders.

[6] In any matter in the Customs Court:

(a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct.* * * [84 Stat. 280, 28 U.S.C. 2635.]

discretion in defining what acts of foreign governments confer bounties or grants, when the case is doubtful."

Also, as was stated by the Court of Customs and Patent Appeals in *United States* v. *Zenith Radio Corporation*, 64 CCPA 130, at pages 138–39, C.A.D. 1195 (1977), *aff'd*, 437 U.S. 443 (1978):

> * * * Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty," "grant," or "net amount," in the statute or anywhere else, for almost 80 years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.
>
> * * * * * * *
>
> Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the *economic* result of the foreign government's action which controls. Thus, the language of § 303, "[w]henever any country * * * shall pay or bestow * * * any bounty or grant," requires a factual inquiry. The statute assigns that factual inquiry, in the first instance, to the Secretary. Courts may review a factual record upon which a determination has been based, but are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action. * * * [Italic supplied.]

And as stated by the Supreme Court in *Zenith* v. *United States* (pp. 14–15 of slip opinion):

> Aside from the contention, discussed in part III, infra, that the Department's construction is inconsistent with this Court's decisions, petitioner's sole argument is that the Department's position is premised on false economic assumptions that should be rejected by the courts. In particular, petitioner points to "modern" economic theory suggesting that remission of indirect taxes may create an incentive to export in some circumstances, and to recent criticism of the GATT rules as favoring producers in countries that rely more heavily on indirect than on direct taxes.[14] But even assuming that these arguments are at all relevant in view of the legislative history of the 1897 provision and the longstanding administrative construction of the statute, they do not demonstrate the unreasonableness of the Secretary's

[14] See, e.g., Marks & Malmgren, Negotiating Nontariff Distortions to Trade, 7 L. & Policy in Int'l Bus. 327, 351–355 (1975); The United States Submission on Border Tax Adjustments to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Cooperation and Development (1966), reprinted in App. 93–116; Paper Submitted by John R. Petty, Asst Sec'y of the Treasury, Twenty-First Annual Conference of the Canadian Tax Foundation (1968), reprinted in App. 117–138. Both the Secretary and GATT apparently consider remissions of direct taxes (e.g., income taxes) to be countervailable export subsidies. See Brief for the United States 18 n. 10, 37–38; GATT, Basic Instruments and Selected Documents, 9th Supp., at 186–187 (1961).

> current position. Even "modern" economists do not agree on the ultimate economic effect of remitting indirect taxes, and—given the present state of economic knowledge—it may be difficult, if not impossible, to measure the precise effect in any particular case. See, e.g., Executive Branch GATT Studies, supra, at 13–14, 17; Marks & Malmgren, supra, n. 14, at 351. More fundamentally, as the Senate Committee with responsibility in this area recently stated, "the issues involved in applying the countervailing duty law are complex, and . . . internationally, there is [a] lack of any satisfactory agreement on what constitutes a fair, as opposed to an 'unfair,' subsidy." S. Rept. No. 93–1298, page 183 (1974). In this situation, it is not the task of the judiciary to substitute its views as to fairness and economic effect for those of the Secretary.

The facts in *Zenith*, supra, were that Japan imposed a commodity tax on electronic products when they were sold in that country but remitted the tax for those products which were exported. The issue was whether Japan conferred a "bounty" or "grant" on certain consumer electronic products by failing to impose the commodity tax on those products when they were exported.

The Court concluded the determination made by the Secretary of the Treasury was reasonable in holding that the nonexcessive Japanese tax was not a "bounty" or "grant" within section 303(a) of the Tariff Act of 1930, as amended, and should not be countervailed.

In supplemental briefs filed here the parties have debated the relevance of *Zenith*. The Supreme Court's opinion certainly is not on all fours with the instant litigation. In *Zenith*, a tax remission was involved. Here, we have cash subsidies given for certain "underdeveloped" areas. Nevertheless, the approach of *Zenith* and the general thrust do have significant relevance for the case at bar.

In the *Zenith* case, the Supreme Court stated (p. 7 of slip opinion):

> The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975). * * *

In the instant case, there is no question but that the Government's interpretation is "sufficiently reasonable."

In view of the legislative intent, the presumption of correctness, the reasonableness of the Secretary's decision, and the thrust of *Zenith*, it is the holding of this court that the programs of Great Britain do not come within the purview of section 303(a) of the Tariff Act of 1930, as amended.[7]

In light of the result reached, the court has not discussed all the arguments of the parties.

For all these reasons, plaintiffs' motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted. Judgment will be entered accordingly.

[7] The recent decision of Judge Ford of this court, C.D. 4782, decided Jan. 5, 1979, appeal pending, is noted.

(C.D. 4789)

AMERICAN BOSCH, DIV. OF AMBAC IND., INC. v. UNITED STATES

Memorandum Opinion and Order

Court No. 75–5–01230

Port of Boston

(Dated February 21, 1979)

Baker & McKenzie (*Bruce H. Jackson* and *William D. Outman II*, of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, attorney), for the defendant.

BOE, Judge: Plaintiff has moved for judgment on the pleadings pursuant to rule 4.9 of this court, and the defendant has cross moved to dismiss the above-entitled action for lack of jurisdiction. Despite plaintiff's presentation of a potentially meritorious argument on the merits of its claim, the presence of certain procedural defects going to the heart of this court's jurisdiction requires that the defendant's cross-motion to dismiss be granted.

The merchandise in issue, fuel injection pumps, was entered at the Port of Boston on December 29, 1971, under entry No. 01872. This entry was liquidated on May 10, 1974. On August 5, 1974, plaintiff filed protest No. 04014000469 (hereinafter protest '69) which contested the imposition of the 10 percent surcharge upon entry 01872 pursuant to Presidential Proclamation 4074, TSUS, item 948.00. This protest was denied on March 24, 1977. No civil action was commenced in this court to contest this denial.

However, on August 5, 1974, plaintiff also filed protest No. 04014000470 (hereinafter protest '70) to contest Customs' denial of a reduction in the dutiable value of the merchandise contained in entry 01872, pursuant to TSUS item 807.00. This protest, which made no mention of either protest '69 or the plaintiff's surcharge claim, was denied on November 18, 1974. Thereafter, on May 15, 1975, plaintiff filed the instant civil action to contest the denial of protest '70.[1]

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[1] Plaintiff's summons and subsequent complaint in the instant action contests three administrative decisions:

(1) Customs' imposition of the 10 percent surcharge upon the instant merchandise which was entered on Dec. 29, 1971, by reason of the fact that Presidential Proclamation 4066 repealed Proclamation 4074 and the surcharge on all merchandise entered for consumption on or after Dec. 20, 1971.

(2) Customs' refusal to accord American goods returned treatment under item 807.00 to the merchandise, and

(3) The addition by customs of 7.4 percent to the invoice unit values to reflect currency fluctuations.

The plaintiff's motion for judgment on the pleadings concerns solely its first claim relating to the imposition of the surcharge. This claim was not, however, the subject of protest '70, which forms the basis for this civil action. The plaintiff's third claim in this action, relating to certain percentage additions in the appraised value to reflect currency variations, in fact never has been the subject of an administrative protest.

By the requisite conditions imposed in 28 U.S.C. 1582(c), this court lacks jurisdiction over an action unless a valid protest has been filed in accordance with 19 U.S.C. 1514 providing in pertinent part:

> * * * *Only one protest may be filed for each entry of merchandise*, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest. * * * [Italic added.] (19 U.S.C. 1514(b)(1).)

Plaintiff urges, however, that in the enactment of the Customs Courts Act of 1970 and the afore-quoted section in particular, Congress intended to permit the filing of multiple protests with respect to a single entry of merchandise. Predicated upon this premise, it further contends that protest '69 and protest '70 were filed concurrently thereby allowing the claims set forth therein to be deemed part of a single protest and, accordingly, the subject of the instant action.

The congressional intent to authorize the filing of multiple protests, the plaintiff argues, is evidenced by the language contained in section 1514 afore-quoted providing that a protest "*may be* filed." Counsel distills from this language the theory that the permissive connotation of the word "may" sanctions the repeated and/or multiple filing of protests to an individual entry.

The argument of counsel, however, would appear to lack in persuasiveness what it possesses in ingenuity. This court is unable to reach the conclusion which the plaintiff seeks to establish. The statutes relating to the institution of civil actions in this court are clear and unambiguous. The intent of Congress, accordingly, can and must be determined therefrom. Indeed, the word "may" as used in 19 U.S.C. 1514 is permissive in character. However, the term relates solely to the privilege to exercise the right, if so desired, to file a protest to the administrative decisions of customs. If an election is made to dispute one or more administrative decisions with respect to a single entry of merchandise, section 1514 is manifestly clear in requiring that the contest of such administrative decisions must be contained in one protest, except:

1. Where the entry covers merchandise of different categories.
2. Where separate protests are filed by different authorized persons.

Since neither of the foregoing exceptions is applicable in the instant action, only one protest could be validly filed with respect to the single entry of merchandise herein, No. 01872.

This court has held in prior decisions that only the first protest filed with respect to an entry of merchandise is valid under the provisions of 19 U.S.C. 1514(b)(1). See for example, *Ross Togs, Inc.* v.

United States, 79 Cust. Ct. 119, C.D. 4722 (1977); *cf. Ataka America, Inc.* v. *United States*, 79 Cust. Ct. 135, C.D. 4724 (1977). However, since protest '69 and protest '70 were filed on the same day and at the same time, the plaintiff questions the sequence in which the respective protests were stamped and numbered. Plaintiff has made no showing that any administrative irregularity existed or that proper administrative procedure precluded the acceptance and numbering of the respective protests presented for filing. On the contrary, the plaintiff has offered no explanation as to the reason why the two protests were filed concurrently. Nor, in seeking to contest additional administrative decisions, has the plaintiff offered any explanation as to why amendments were not made in conformity with 19 U.S.C. 1514(b)(1), providing in pertinent part:

> * * * A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. * * *

Protest '69 administratively having been designated the first and thereby the only protest validly filed, protest '70 and its denial upon which the summons and complaint herein are specifically predicated cannot confer jurisdiction upon this court.

Notwithstanding the foregoing, even were it to be assumed that protest '70 had been validly filed, it, nevertheless, could not serve as a basis for the exercise of jurisdiction by this court in the above-entitled action and the plaintiff's motion for judgment on the pleadings since the claim relating to an invalid imposition of a surcharge was not contained therein. See for example, *Chas. Kurtz Co.* v. *United States*, 57 Cust. Ct. 84, C.D. 2734 (1966); *cf. Green Giant Co.* v. *United States*, 79 Cust. Ct. 61, C.D. 4715 (1977).

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff's motion for judgment on the pleadings is denied, and it is further

ORDERED that the defendant's cross-motion to dismiss the above-entitled action for lack of jurisdiction is granted and the above-entitled action be and is hereby accordingly dismissed.

(C.D. 4790)

HAWAIIAN MOTOR COMPANY *v.* UNITED STATES

Mechanical equipment

Chief Use—Condition of Merchandise as Imported—Class or Kind

Gasoline-powered, hand-operated brush cutters imported at Los Angeles-Long Beach, Calif. from Japan and classified in liquidation under TSUS item 674.70 as hand-directed or controlled tools with pneumatic or self-contained nonelectric motor, *Held*, properly classified as against claim by the importer for classification of the brush cutters under TSUS item 666.00 as hay or grass mowers or as agricultural or horticultural implements not specially provided for, where most of the evidence of chief use relied upon by the importer reflects a condition of the merchandise other than as imported and the remaining evidence falls short of establishing the chief use of a class or kind of merchandise to which the imported brush cutters belong.

Court No. 75-12-03069

Port of Los Angeles

[Dismissed.]

(Decided March 8, 1979)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this action, described on commercial invoices as "Xenoah" BCD brush cutters, was exported from Japan in 1975, and classified in liquidation upon entry at Los Angeles, Calif., under TSUS item 674.70 as modified by T.D. 68-9 as hand-directed or -controlled tools with pneumatic or self-contained nonelectric motor, and parts thereof, other, at the duty rate of 4.5 per centum ad valorem. The plaintiff-importer claims that the merchandise is properly classifiable under TSUS item 666.00 as hay or grass mowers (except lawnmowers) or as agricultural and horticultural implements, not specially provided for, and parts thereof, free of duty. And the Government claims, alternatively, that in the event the court overrules the classification of the imported merchandise, then the merchandise is properly classifiable under TSUS item 666.10 as modified by T.D. 68.9 as lawnmowers, at the duty rate of 10 per centum ad valorem.

In the complaint plaintiff alleges that the merchandise in issue was chiefly used in the United States at the time of importation to cut hay, brush, weeds, and foliage in agricultural and horticultural pursuits. Although this allegation is put in issue by the Government's answer, it is noted that there is no allegation in the complaint concerning the chief use of any class or kind of article to which the imported article is alleged to belong.

As imported the merchandise consists of a 22.5 cm^3 gasoline engine, stand, tool kit, and two blades packed in one carton, and a drive shaft packed separately in another carton. However, the record shows that the merchandise is not marketed in this country in the condition in which it is imported. As sold here the product, referred to by plaintiff as the "Green Machine 3000", consists of some of the imported merchandise plus a nylon cord trimmer, and, in some cases, a hedge trimmer, and/or a two-speed drill. The nylon cord trimmer is used in place of the imported brush and saw blades which are usually sold here only as *accessories*. And when either the hedge trimmer or two-speed drill is to be used, the engine is detached from the shaft and coupled to the trimmer or drill.

Most of the rather extensive testimony given by witnesses called on plaintiff's behalf on the issue of chief use is directed to the use of the article with components *added in the United States*, principally the nylon cord trimmer. However, since such evidence reflects a condition of the merchandise *other than as imported*, this evidence is irrelevant on the issue of chief use, and cannot properly be considered by the court in connection with classification of the imported merchandise. It is well settled that classification of an imported article must rest upon its condition as imported. *The Carrington Co. et al. v. United States*, 61 CCPA 77, 81, C.A.D. 1126, 497 F. 2d 902 (1974); *United States* v. *Citroen*, 223 U.S. 407, 414–415 (1912).

In reaching this conclusion the court is not unmindful of the case of *Theo. H. Davies & Co., Ltd*, v. *United States*, 70 Cust. Ct. 5, C.D. 4399 (1973), to which attention has been called by plaintiff. In that case a cane grabber was added after importation to the imported cane loader adjudged by the court to be in a class by itself, and the presence of the cane grabber was considered by the court in reaching its conclusion of chief use as an agricultural implement entitled to classification under TSUS item 666.00 as claimed by the importer.

It is clear, however, that the facts in C.D. 4399 are significantly different from those at bar. In C.D. 4399 the cane loader was used only for harvesting sugarcane, and the added cane grabber was obviously *complementary* to this singular use. In the instant case, the components added in the United States are not *complementary* to the use of the imported blades, but are *substitutes* therefor, and involve

different uses. As such, C.D. 4399 does not pose a deterrent to the court's rejection here of the evidence offered by plaintiff embracing post-importation components. The court fully agrees with defendant's contention that "any arguments, evidence or exhibits that rely upon the use of the imported article with other than the imported saw or brush blade are completely without relevance or merit, and cannot be a proper basis for the classification of the merchandise before this Court." [1] (Defendant's brief, p. 19)

With respect to the blade-equipped imported article, Dale Duane Evenson, plaintiff's president, testified that with the brush blade one can cut heavy, stalky brush, and clear brush with it, and that with the saw blade one can clear out heavy brush as well as trim branches off trees and other plant-type things. The witness pointed out that the Xenoah BCD brush cutter has an all-position diaphragm carburetor which enables one to turn the cutter up and reach overhead in connection with work in trees and on hillsides. Mr. Evenson stated that he did not know how plaintiff's sales of the imported brush cutter compared with sales of competitors in 1974 and 1975 who numbered about three or four.

A promotional film sold by plaintiff through its distributors to dealers depicts, among other things, the use of the Green Machine 3000 equipped with a blade in an overhead posture (exhibit 2). Another promotional film (exhibit 3) depicts, among other things, the Green Machine 4000 equipped with a blade being used in an upright position. It is said that the model 4000 machine, being a heavy-duty machine with a larger motor and more power than the model 3000 machine, lacks the all-position diaphragm carburetor which would enable it to be used in an overhead posture as is done with the model 3000 machine.

There is little evidence in the record as to how blade-equipped brush cutters were used in the United States as of the time of importation of Xenoah BCD brush cutters at bar. Of the six witnesses presented by plaintiff none testified to any significant extent relative to blade-equipped cutting machines.

Joel F. Herman, grounds maintenance contractor for Maintenance Engineers of Los Angeles, Calif., testified that his company didn't use the blades on its Green Machines.

Carl J. Cole, a lawnmower equipment sales and service store owner based in Wichita, Kans., testified that only 20 percent of the Green Machines he sold were equipped with blades.

Wilbur L. Johnson, head of Johnson Agricultural Corp., an orchard management and development business in San Diego, Calif., testified

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[1] With the rejection of evidence of post-importation components for irrelevancy, the court also does not reach defendant's alternative claim for classification of the imported brush cutters under item 666.10 as lawn mowers inasmuch as this claim is predicated upon the rejected evidence (defendant's brief, p. 37).

that he *thought* the majority of the 35 model 3000 Green Machines he sold from late 1975 until late 1977 were equipped with blades.

Bryant Cleve Larson, president of Oregon Toro Distributors, a specialty wholesaler of lawn and garden products in the southwest river counties in the State of Washington, testified about sales of Green Machines and observed uses thereof in Oregon and Washington only in *1976* and *later*.

Gordon Paul Davis, general manager of Pacific Turf of San Diego, Calif., which is in the business of commercial sales and distribution of turf equipment, testified that he has seen the Green Machine 3000 used, among other things, for pruning trees in the San Diego County area.

Thus, only the witness Davis offered any relevent testimony relating to the use of the imported brush cutter during the period in question. However, plaintiff presented no evidence as to the chief use of a *class or kind* of merchandise to which the imported merchandise belongs. And, unlike the situation in C.D. 4399, the instant record indicates that three other blade-equipped cutting machines were produced or offered for sale in this country during the period in question which competed with the imported article.

Classification of articles under item 666.00 is controlled by use. And the use which governs is the chief use of the *class or kind* of articles at or immediately prior to importation to which the importation belongs. General Interpretative Rule 10(e)(i). See also, *United States* v. *Baltimore & Ohio RR. Co., a/c United China & Glass Co.*, 47 CCPA 1, C.A.D. 719 (1959).

Further, chief use must be predicated upon evidence which is representative of an adequate cross section of the country. *L. Tobert Co., Inc., et al.* v. *United States*, 41 CCPA 161, 164, C.A.D. 544 (1953).

Measured against these principles it is clear that plaintiff's evidence falls well short of establishing the chief use of the *class or kind* of merchandise to which the imported merchandise belongs as hay or grass mowers, or as agricultural and horticultural implements, not specially provided for, within the meaning of item 666.00.

There is no indication of record that the merchandise as imported was equipped with a blade guard for use in connection with the operation of the two circular blades, and two witnesses gave the absence of a blade guard as a reason for not using the machine. The witness Herman testified on cross-examination by defendant's counsel (R. 57):

> Q. Would you use the blades in that more than you would the monofilament head?—A. We use, basically, the monofilament for a safety standard. We have had very poor luck keeping the safeguards. Our men sort of discharge them, and my insurance company frowns on them, so we stay strictly with the monofilament yarn.

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In the same connection, Arnold J. Reah, general manager of Piston Powered Products, a manufacturer of gasoline-powered two-cycle engines and accessory tools, testified on cross-examination by plaintiff's counsel (R. 315):

> Q. In your experience with the farm, would you say the Green Machine 3000 would be a handy tool to trim the branches of orchards on the farm?—A. We did not have orchards, so to speak, on our particular farm. As far as myself, I have to go along with my feeling before that I think it is quite dangerous.
> Q. Have you ever used the Green Machine to cut overhead?—A. No.
> Q. Have you ever done it?—A. No, I have not.
> Q. You don't know whether it is safe or not?—A. I see a blade rolling around and I don't want to use it.

On his direct examination the witness Reah testified that his company contemplated producing a cutting machine equipped with a blade at one time, but decided not to do so after evaluating the amount of sales of the blade and the safety hazard (R. 305).

The court, while viewing the demonstration film of the Green Machine 3000, observed the unshielded cutting blades, and an exposed blade revolving at 5,000 revolutions per minute or more represents a potential source of danger to the machine operator and others should the blade separate from the power shaft for any reason while the machine is being manipulated overhead, or even along the ground. As such, the court is not inclined to presume from an inspection or other examination of the imported merchandise that a *class or kind* of merchandise to which the imported merchandise belongs is being used in this country in the manner contended for by plaintiff.

But even if the court could conclude, as plaintiff suggests (plaintiff's brief, p. 30) that "the character of the Green Machine demonstrates its chief use as a horticultural implement", the court fails to see how this would aid the plaintiff in this case. The very versatility of the Xenoah BCD model, i.e., ability to prune overhead as well as to cut in a sweeping arc at ground level, demonstrates that this particular model is something "other than" or "more than" a *grass mower* for purposes of classification under the eo nomine provision therefor in item 666.00, and as such, could not properly be classified thereunder. Moreover, the Xenoah BCD model does not appear to be the model intended by the foreign manufacturer to be used for grass or pasture mowing, according to literature attached by plaintiff to its administrative protests filed in the case, depicting another model equipped with knifelike rotary blades under a disk cover for ground level operation.

And, as for classification of the Xenoah BCD model under the residual provision in item 666.00 for *horticultural implements not specially provided for*, such action would only be warranted if the

cutting machine were not specially provided for in the TSUS. See headnote 1, schedule 6, part 4C, TSUS. However, the court is firmly of the opinion that the Xenoah BCD brush cutter is described by and falls squarely within the provision for hand-directed or -controlled tools with self-contained nonelectric motor in item 674.70, and is, therefore, specially provided for in the TSUS. The machine is hand operated, and, when fully assembled, contains a self-contained nonelectric motor. The court is not persuaded that the designation "motor" in item 674.70 is to be given a meaning other than or more restrictive than its common meaning which, of course, embraces the term "engine". And, in the court's view, an article which is described in a tariff provision in terms of its functions, properties, or attributes, or any combination thereof, as is the case with item 674.70, is as much "specially provided for" as is an article which is described in a tariff provision in terms of its name.

It follows, therefore, that since plaintiff has failed to establish prima facie the chief use of the imported brush cutters the action must be dismissed.

Judgment will be entered herein accordingly.

(C.D. 4791)

BLOCK HANDBAGS INC. *v.* UNITED STATES

Lack of jurisdiction

Court No. 78–10–01807

Port of New York

[Motion to dismiss granted.]

(Dated March 8, 1979)

Mandel & Grunfeld (*Robert B. Silverman* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

RICHARDSON, Judge: Plaintiff moves under rule 3.2(f) for an order granting it leave to file an amended summons correcting page CC–S3 of the summons to show entry No. K383327 rather than entry No. K387327 to be covered by protest No. 1001–7–006774. Plaintiff asserts that the error was *typographical* in nature, and that a correction will not prejudice defendant.

Defendant opposes the motion, and cross-moves under rules 4.7(b) and 4.12 for an order severing the action and dismissing it as to entry No. K387327. Defendant asserts that it would be prejudiced if the

relief sought by plaintiff is granted, pointing out that entry No. K387327 appeared not only on the summons but also on protest No. 1001–7–006774, and that the proposed amendment would encompass an entry of merchandise which was never covered by the protest. Plaintiff did not respond to the cross-motion.

An examination of the court's files accompanying the instant motions disc'oses:

(a) a TRANSMITTAL SHEET on which is noted – "Entry No. K387327 cannot be identified with Importer of record. See attached 5101.";
(b) a SUMMONS in which plaintiff is designated as "Importer" as to protest No. 1001–7–006774 covering entry No. K387327;
(c) a CUSTOMS FORM 5101 covering entry No. 387327 dated June 28, 1977, which is signed by S. STERN CUSTOM BROKERS INC. on behalf of RAYMOR RICHARDS MORGENTHAU INC., Div. of Raymor Mfg.; and
(d) a PROTEST filed Oct. 12, 1977, in which plaintiff is designated as the protesting party as to entry No. K387327 against a decision, liquidation and assessment at 25 percent under TSUS item 656.25, which was denied under date of June 23, 1978, by the appropriate customs officer on the ground that "No item in this entry was entered under TSUSA 656.25/25 percent".

On the state of the record before the court the court agrees with the defendant. Amending the summons in the manner sought by plaintiff in its motion would have the effect of placing the entry covered by the summons at variance with the entry covered by the administrative protest. And there is no indication in the record that such an amendment was sought by plaintiff at the administrative level as provided for in 19 U.S.C.A. 1514(b)(1) and 19 CFR 174.14 (1977).

Further, although there is nothing in the protest itself to indicate the capacity in which plaintiff acted in filing that document administratively,[1] i.e., whether as *importer*, *consignee*, or *agent*, plaintiff has represented to the court that it acted as *importer* in filing the summons. However, since the asserted capacity is conclusively refuted by the disclosures of different parties in Customs form 5101, it is clear that plaintiff lacks standing to prosecute the action as authorized under 28 U.S.C.A. 1582(a), vis-a-vis 19 U.S.C.A. 1514(b)(1).

Therefore, plaintiff's motion to amend is denied, and defendant's cross-motion to sever and dismiss is granted.

[1] This would appear to account for the disposition of the protest on its merits rather than on jurisdictional grounds.

(C.D. 4792)

ALBERTA GAS CHEMICALS, INC. *v.* W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ROBERT H. MUNDHEIM, GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY, ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS, AND THE UNITED STATES OF AMERICA

Opinion and Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Dismissal

Court No. 78-8-01418

[Defendants' cross-motion for dismissal granted; plaintiff's motion for summary judgment denied.]

Order dated March 15, 1979

Opinion promulgated March 23, 1979

Freeman, Meade, Wasserman & Schneider (*Bernard J. Babb* and *Herbert Peter Larsen* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendants.

NEWMAN, Judge: Plaintiff, who *inter alia* is an importer of methyl alcohol (methanol or wood alcohol) from Canada, seeks a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that the Secretary of the Treasury (Secretary) lacked authority to initiate an investigation under the Antidumping Act of 1921, as amended (19 U.S.C. 160 *et seq.*) (Antidumping Act), and requiring that defendants should refrain from the prosecution of such investigation. Additionally, plaintiff requests "whatever ancillary relief may be necessary and proper pursuant to 28 U.S.C. 2202".

Presently before the court are plaintiff's motion for summary judgment under rule 8.2. of the rules of this court, and defendants' cross-motion for dismissal under rule 4.7(b) on the ground that the court lacks jurisdiction of the subject matter of this action.

After careful consideration of both counsel's memoranda of law and affidavit of plaintiff's president, John J. LoPorto, filed in support of plaintiff's motion, I have concluded that defendants' motion for dismissal must be granted. Accordingly, I do not reach the issue of the validity of the Secretary's determination to initiate the antidumping investigation.

I

The material facts, which are not in dispute, may be briefly summarized:

On May 2, 1978, the Secretary received information "in proper form", in accordance with sections 153.26 and 153.27, Customs Regulations (19 CFR 153.26, 153.27) from E. I. du Pont de Nemours & Co., alleging that methanol exported from Canada is being, or is likely to be, sold at less than fair value within the meaning of the

Antidumping Act. On the basis of this information and subsequent preliminary investigation by the Customs Service, an "Antidumping Proceeding Notice", dated June 8, 1978, was published in the Federal Register of June 14, 1978 (43 F.R. 25758). This notice stated, *inter alia*, that the Customs Service was instituting an investigation "to verify the information submitted and to obtain the facts necessary to enable the Secretary of the Treasury to reach a determination as to the fact or likelihood of sales at less than fair value".

By a letter (captioned "Protest/Notice of Intent to Contest 43 F.R. 25758, June 14, 1978") dated June 23, 1978, to the Secretary, the Commissioner of Customs and the General Counsel of the Treasury Department, plaintiff contested the initiation of the antidumping investigation. In essence, the predicate of plaintiff's "protest" was that the Secretary's determination on June 8, 1978 to initiate the investigation was made more than 30 days after receipt of information (on May 2, 1978), and consequently the determination and investigation are void and *ultra vires*, since they contravene the time limit prescribed by 19 U.S.C. 160(c)(1).[1] In a reply letter dated July 7, 1978, the Treasury Department informed plaintiff that it was proceeding with the antidumping investigation notwithstanding that such investigation was initiated more than 30 days after the du Pont petition was filed, since assertedly the statutory time limit is directory rather than mandatory.

A "Withholding of Appraisement Notice" respecting methanol from Canada was published in the Federal Register of December 19, 1978 (43 F.R. 59196).

II

The gravamen of plaintiff's action is that under 19 U.S.C. 160(c)(1) the Secretary's authority to initiate the full scale investigation of the information submitted by du Pont on May 2, 1978, terminated by operation of law 30 days after receipt of such information, viz., on June 1, 1978. Consequently, according to plaintiff, the Secretary's determination on June 8, 1978, to institute an investigation and the publication of the "Antidumping Proceeding Notice" on June 14, 1978, are illegal and ultra *vires acts*, as are all subsequent proceedings in the matter.

III

Initially, we must consider the threshold jurisdictional issue presented. In support of their cross-motion to dismiss, defendants insist

[1] This provision reads: "(c)(1) The Secretary shall, within 30 days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed."

that the statutory prerequisites for invoking the court's jurisdiction under 28 U.S.C. 1582 have not been complied with.

Preliminarily, it should be observed that there is no dispute in this case that under section 1582 the Customs Court has subject matter jurisdiction over actions arising under the Antidumping Act. "In such cases (the Customs Court) may review the actions of the Secretary of the Treasury and the Tariff Commission (now U.S. International Trade Commission) to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Traiff Commission, or their delegates have proceeded within the statutory authority or whether their actions are *ultra vires* and void". *Matsushita Electric Industrial Company, Ltd.* v. *United States Treasury Department*, 67 Cust. Ct. 328, 331, C.D. 4992 (1971), aff d, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402 (1973), *cert. denied*, 414 U.S. 821 (1973). However, to borrow phraseology from *Matsushita*, the present case "is outside the framework of the general statutory scheme for customs litigation and the question is whether this court has any authority to entertain it". 67 Cust. Ct. at 331.

Prior decisions have stressed "the precise and narrow jurisdictional limits within which this court operates". *Russell Stanfield Dexter* v. *United States*, 78 Cust. Ct. 179, C.R.D 77-1, 424 F. Supp. 1069 (1977). *Accord, United States* v. *Nils A. Boe*, 64 CCPA 11, C.A.D. 1177, 543 F. 2d 151 (1976); *Matsushita, supra*. See also Judge Richardson's well reasoned decision in *Flintkote Company, Glens Falls Division* v. *United States* (*Independent Cement Co., Party-in-Interest*), 82 Cust. Ct. —, C.R.D. 79-5 (1979). Cf. Judge Foley's recent unreported memorandum-decision and order in *Flintkote Company, Glens Falls Division* v. *W. Michael Blumenthal, Secretary of the Treasury*, Civil Action 78-CV-640 (N.D.N.Y. 1979), decided February 16, 1979, *aff'd*, — F. 2d — (C.A. 2, March 19, 1979). Indeed, our Court of Appeals has noted that 28 U.S.C. 1582 "both establishes and limits the jurisdiction of (the Customs) Court". *Boe*, 64 CCPA at 15-16.

Section 1582 provides, so far as pertinent herein:

§ 1582. Jurisdiction of the Customs Court

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) The appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a

claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

* * * * * * *

As may be seen above, section 1582(c) explicitly confines this court's jurisdiction to actions in which: (1) Either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514), and denied in accordance with section 515 of the Tariff Act of 1930, as amended (19 U.S.C. 1515), or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), all remedies prescribed therein have been exhausted; and (2) all liquidated duties, charges or exactions have been paid at the time the action is filed, except in the case of an action relating to a decision under section 1516. The jurisdictional prerequisites under section 1582 are mandatory, "the statute having provided no room or opportunity for the exercise of discretion". *Boe*, 64 CCPA at 16.

IV

Plaintiff posits that it has fulfilled "all applicable conditions" under sections 1514 and 1515 (reply brief at 9). Section 1514 lists seven categories of administrative decisions which may be protested (including the legality of all orders and findings entering into the same). Thus, section 1514, so far as pertinent, reads:

§ 1514. Protest against decision of appropriate customs officer

(a) Finality of decisions; return of papers

Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the U.S. Customs Court in accordance with section 2632 of title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the U.S. Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

(b) Form, number, and amendment of protest; filing of protest

(1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. * * *

* * * * * * *

As previously mentioned, plaintiff claimed in its letter of June 23, 1978, that the Secretary's determination to initiate an antidumping investigation was untimely. and therefore the determination and investigation are void and *ultra vires*. In an apparent effort to bring its claim within one of the seven categories of administrative decisions enumerated in sections 1582(a) and 1514(a), plaintiff points to the language in subdivision (a)(3) in sections 1582 and 1514 "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury" (including the legality of all orders and findings entering into the same). Thus, plaintiff advances the argument that it is contesting an order or finding entering into a "charge or exaction" within the purview of section 1582(a)(3) and section 1514 (a)(3). I find no merit in this contention.

The terms "charges" and "exactions" as used in subdivision (a)(3) of sections 1582 and 1514 were not intended to embrace an interlocutory determination by the Secretary to initiate an antidumping investigation. Rather, from a review of a long line of cases involving

"charges" and "exactions", it is obvious that these terms have been applied to actual assessments of specific sums of money (other than ordinary customs duties) on imported merchandise. See, e.g., *United States* v. *Davies Turner & Company*, 48 CCPA 159, C.A.D. 784 (1961); *Puget Sound Freight Lines* v. *United States*, 36 CCPA 70, C.A.D. 400 (1949); *Guy B. Barham Co.* v. *United States*, 35 CCPA 138, C.A.D. 385 (1948); *United States* v. *Frank F. Smith & Co.*, 25 CCPA 163, T.D. 49267 (1937); *United States* v. *Hawley & Letzerich*, 17 CCPA 110, T.D. 43452 (1929); *United States* v. *Frame & Co.*, 13 Ct. Cust. Appls. 603, T.D. 41457 (1926); *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. Appls. 373, T.D. 34872 (1914); *United States* v. *Masson*, 4 Ct. Cust. Appls. 363, T.D. 33534 (1913); *Arbuckle Bros.* v. *United States*, 3 Ct. Cust. Appls. 105, T.D. 32362 (1912); *J. M. Altieri* v. *United States*, 38 Cust. Ct. 498, Abs. 60742 (1957); *W. X. Huber* v. *United States*, 29 Cust. Ct. 92, C.D. 1451 (1952), *rev'd on other grounds*, *United States* v. *W. X. Huber*, 41 CCPA 69, C.A.D. 531 (1953); *L.A. Importing House* v. *United States*, 16 Cust. Ct. 1, C.D. 974 (1945), *decided on rehearing*, 19 Cust. Ct. 94. Abs. 51789 (1947). In the instant case, there has been no assessment of any "charge" or "exaction", nor any order or finding entering into a charge or exaction.

V

The thrust of defendants' motion to dismiss is premised on the argument that because of the particular statutory constraints on this court's jurisdiction, the instant action is premature and anticipatory. I agree.

Procedurally, the Antidumping Act requires, first, a determination by the Secretary that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value (LTFV); and secondly, if the Secretary's determination is affirmative, a determination by the International Trade Commission as to whether an industry in this country is being, or is likely to be, injured, or is prevented from being established by reason of the importation of such merchandise at LTFV. Affirmative findings by both the Secretary and the Commission result in a finding of "dumping", which is published in the Federal Register by the Secretary.[2] Merchandise subject to the dumping finding, including entries of such merchandise as to which appraisement has been withheld pending resolution of the dumping question, is thereupon appraised and assessed with a special dumping duty in addition to any other duties imposed thereon by law. 19 U.S.C. 160 *et seq.* The general procedures followed

[2] Obviously, these requisite affirmative determinations may not materialize in the instant antidumping proceedings. Since the investigation contested herein may never ultimately culminate in a finding of dumping, plaintiff's characterization of the Secretary's determination on June 8, 1978 as "final agency action" (brief at 16) is plainly erroneous.

in an antidumping investigation are thoroughly discussed by Chief Judge Re in a landmark case, *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2, 450 F. Supp. 1178 (1978), and for present purposes need not be further pursued. The importer, consignee or authorized agent of the person paying such duties may then file a protest as prescribed by section 1514 and, upon its denial, may commence a civil action in this court, under 28 U.S.C. 2632.

In short, it is only in the event that there are affirmative LTFV and injury determinations and dumping duties are actually assessed that plaintiff may contest the legality of the Secretary's determination to initiate the antidumping investigation challenged herein. Consequently, inasmuch as there has been no liquidation nor assessment of dumping duties but merely the Secretary's determination to initiate the antidumping proceeding, the filing of the so-called "protest" and the commencement of the present action were premature and anticipatory.

Matsushita explicitly held that the Customs Court lacked jurisdiction under the All Writs Act (28 U.S.C. 1651) to grant injunctive and declaratory relief against antidumping proceedings wherein the Secretary had made an affirmative LTFV determination, but no dumping duties had been levied.

In *J. C. Penney Company, Inc.* v. *United States Department of the Treasury*, 319 F. Supp. 1023 (S.D.N.Y. 1970), *aff'd*, 439 F. 2d 63 (C.A.2 1971), *cert. denied*, 404 U.S. 869 (1971), the plaintiff (an importer of television sets from Japan) sought declaratory and injunctive relief in the District Court preventing the Treasury Department from conducting an investigation into whether the television sets were being sold at LTFV, alleging that the methods employed by the Treasury Department in making its LTFV determination violated due process. Plaintiff sought relief in the District Court on the ground, *inter alia*, that the Customs Court lacked jurisdiction over the controversy since no protest could then be filed.

The Court of Appeals, in affirming the District Court's dismissal of the action for lack of subject matter jurisdiction, addressed itself to Penney's remedy in the Customs Court (439 F. 2d at 68):

> * * * Thus the only remedy available to Penney is the obtaining of refunds of special dumping duties which may have been improperly assessed and paid. Though it may be true that the ordering of a hearing would be a more desirable form of relief from Penney's point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate. We conclude that there is, in fact, an adequate remedy available to Penney in the Customs Court. * * *

Again, in *Manuli Tape, Inc.* v. *Daniel Minchew*, Civil Action 77–1152 (D.D.C. 1977), plaintiffs sought a declaratory judgment in the District Court that the International Trade Commission (ITC) lacked authority to conduct a certain antidumping investigation and an injunction prohibiting the ITC from continuing its investigation. In an unpublished memorandum order dated July 26, 1977 denying plaintiffs' motion for preliminary injunctive relief and dismissing the action, the court declined to address the merits of the case on the ground that the issue fell within the exclusive jurisdiction of the Customs Court. The District Court then significantly commented respecting plaintiffs' remedy in the Customs Court and "the procedure contemplated by Congress":

> To be sure, plaintiffs are correct in arguing that the Customs Court would not entertain a motion to enjoin the Commission's investigation *at this time*. This in no way, however, means that the court cannot provide plaintiffs an adequate remedy. *Rather, plaintiffs must await the outcome of the Commission's investigation; after the Antidumping process has run its course and if adverse action is taken against plaintiffs, the Customs Court can entertain the issue they raise.* As the statutes and cases referred to above make clear, such is the procedure contemplated by Congress. [Italic added in part.]

In summary, plaintiff's situation is this: If a finding of dumping is ultimately made by the Secretary, and dumping duties are assessed on plaintiff's imports of methanol, plaintiff will then, in a suit for refund of such duties, have the opportunity in a single proceeding to challenge all orders and findings entering into the assessment, including the legality of the investigation presently contested.

In *Boe*, *supra*, 64 CCPA at 17–18, Chief Judge Markey pointed out that the exercise of jurisdiction by this court prior to the payment of all liquidated duties would foster piecemeal litigation. This consideration is especially apposite where a plaintiff is seeking judicial intervention into an antidumping proceeding at an interlocutory stage, as in the present case. Thus, if plaintiff is properly entitled to judicial review at the investigatory stage of an antidumping proceeding, plaintiff would logically have the right to contest each subsequent phase of the antidumping proceedings, as well as a right of action after an assessment of dumping duties, if such assessment should materialize. Obviously, the jurisdictional scheme applicable to this court under 28 U.S.C. 1582 never contemplated the possibility of such piecemeal challenges to an antidumping proceeding at interlocutory stages.

Plaintiff urges judicial intervention at the present investigatory stage of the antidumping proceedings on the ground that the Secretary's asserted lack of authority to conduct the investigation cannot

be raised at a later stage. In support of this contention, plaintiff cites *United States* v. *Elof Hansson, Inc.*, 48 CCPA 91, C.A.D. 771, 296 F. 2d 779 (1960), *cert. denied*, 368 U.S. 899 (1961). There, the Court of Customs and Patent Appeals held that an alleged procedural irregularity in an antidumping investigation (failure to publish notice of investigation) "should have been raised by timely objection at the administrative level" and that such objection was "waived by participating in the antidumping investigation without making timely objection to the Secretary of the Treasury" (48 CCPA at 95).

Hansson is plainly distinguishable from the present case. In *Hansson*, the Appellate Court found that "[a]t no time during the course of the entire investigation was any issue raised before the Secretary, either directly or through the Customs Bureau, of any procedural irregularities in the investigation * * *" (48 CCPA at 94). Continuing, the court characterized Hansson's position as being "clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and [which] can prevail only from technical compulsion irrespective of considerations of practical justice" (48 CCPA at 95). By contrast, in the present case, plaintiff has timely asserted its objections to the investigation in its "Protest/Notice of Intent to Contest" dated June 23, 1978.

Consequently, there can be no doubt that in the antidumping proceedings challenged herein plaintiff has timely raised its objections before the Secretary and other appropriate officials, and therefore has preserved its right to have the Secretary's determination of June 8, 1978 reviewed *at the appropriate time*.

VI

Plaintiff also argues that since du Pont, an American manufacturer, had the right under 19 U.S.C. 1516 to contest a negative determination by the Secretary respecting sales at LTFV, plaintiff is likewise entitled to "equally immediate review" (brief at 17). This position is erroneous.

A *negative* LTFV determination by the Secretary terminates the antidumping proceeding and, as a *final* administrative determination, such negative LTFV determination is contestable in an action brought by an American manufacturer under section 1516. On the other hand, if the Secretary makes an *affirmative* LTFV determination, such decision is merely *interlocutory* in the antidumping proceedings since, as previously mentioned, the question as to whether there is injury must still be investigated and determined by the International Trade Commission. The 1974 Trade Act did not give an importer the right to contest an affirmative LTFV determination, or any other decision

of the Secretary at an interlocutory stage of an antidumping proceeding.

VII

Plaintiff further contends that under 28 U.S.C. 1582 this suit is "an action relating to a decision under section 516 of the Tariff Act of 1930, as amended", and hence the payment of "all liquidated duties, charges and exactions" is not a condition precedent to invoking the court's jurisdiction. This contention is fundamentally at odds with the statute.

Section 516 (19 U.S.C. 1516) provides for an action by an American manufacturer, producer or wholesaler[3] who wishes to contest a *negative* LTFV determination by the Secretary or his decision *not* to assess antidumping duties. Clearly, in the present case, plaintiff is not challenging a negative LTFV determination or a decision of the Secretary not to assess antidumping duties. Therefore, this action, which contests merely the *initiation of an investigation*, is not "an action relating to a decision under section 516 of the Tariff Act of 1930, as amended" within the purview of section 1582.

VIII

Plaintiff submits several other arguments, which merit but brief discussion.

As authority for subject matter jurisdiction in this action and the relief sought herein, plaintiff heavily relies upon the Administrative Procedure Act, as amended (specifically 5 U.S.C. 702, 703), the Declaratory Judgment Act, as amended (28 U.S.C. 2201, 2202), and the All Writs Act, as amended (28 U.S.C. 1651). Reliance upon the foregoing statutes in the instant action is misplaced.

We first consider the Administrative Procedure Act, as amended (APA).

At the outset, it should be mentioned that in a very recent decision, *Michelin Tire Corporation* v. *United States*, 82 Cust. Ct. —, C.R.D. 79–6 (1979), Judge Watson held that an action contesting an assessment of countervailing duties was not before this court by virtue of the operation of the APA, or pursuant to general principles of judicial review of administrative actions, but rather as a result of the commencement of an independent civil action provided by Congress. In light of Judge Watson's holding and his scholarly and exhaustive opinion, it would be logical to conclude that the APA is inapplicable to an action in this court under the Antidumping Act. However, it is unnecessary to decide this precise issue in the instant case. Even assuming *arguendo* that the APA applies to actions in this court, the Supreme Court held that "the APA does not afford an implied grant of subject-matter jurisdiction permitting Federal judicial review of

[3] Plaintiff asserts that it is an "American wholesaler" within the purview of section 1516.

agency action". *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977). See also the District Court's opinion in *Penney, supra*, 319 F. Supp. at 1030.

Furthermore, plaintiff is not correct in its assertion that "Public Law 94–574 removed any impediment which may have previously impaired the power of this Court to grant the relief requested by plaintiff" (brief at 21). The purpose of the amendatory provision, insofar as pertinent here, was to amend 5 U.S.C. 702 "so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review"; and 5 U.S.C. 703, "to permit the plaintiff to name the United States, the agency or the appropriate officer as defendant * * * [to] eliminate technical problems arising from plaintiff's failure to name the proper Government officer as defendant". H.R. Report No. 94–1656, 94th Cong., 2d sess. 1 (1976). The House Report states, so far as pertinent (at pp. 9–10):[4]

> Other methods found in the substantial and growing body of law governing availability, timing, and scope of judicial review provide a much more rational basis for controlling unnecessary judicial interference in administrative decisions than does the defense of sovereign immunity. Thus, a case is unreviewable if it involves actions "committed to agency discretion by law." Other defenses include (1) statutory preclusion; (2) lack of ripeness; (3) failure to exhaust administrative remedies; and (4) lack of standing. The availability of these defenses—all of which provide a sounder substantive basis to control court review on the merits than the confusing doctrine of sovereign immunity—indicates that the policy against indiscriminate judicial interference with Government action would not be abandoned by eliminating the defense of sovereign immunity.

The House Report further states (at p. 12):

> Law Other Than Sovereign Immunity Unchanged
>
> S. 800 is not intended to affect or change defenses other than sovereign immunity. All other than the law of sovereign immunity remain unchanged. This intent is made clear by clause (1) of the third new sentence added to section 702:
>
> > Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.
>
> These grounds include, but are not limited to, the following: (1) extraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

[4] See S. Rept. No. 94-996, 94th cong., 2d sess. 11 (1976).

Hence, I find that the APA, as amended, does not affect or change defenses other than sovereign immunity where the court otherwise has jurisdiction; nor does the APA confer an additional grant of subject matter jurisdiction upon the Federal courts. And as stated in *Michelin, supra*, "[j]urisdiction in this court must be premised on its own particular and explicit statutory authority" (82 Cust. Ct. at—). Accordingly, 28 U.S.C. 1582, in conjunction with 19 U.S.C. 1514 and 1516 must be viewed as the controlling grant of jurisdiction in the Customs Court, and as respects jurisdiction, the APA is irrelevant.

We now turn to plaintiff's claim for relief under the Declaratory Judgment Act (28 U.S.C. 2201, 2202). It is well settled that this Act neither creates subject matter jurisdiction where none otherwise exists, nor does the Act expand the scope of existing jurisdiction in the Federal courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Schulke* v. *United States*, 544 F. 2d 453 (C.A. 10, 1976); *Workman* v. *Mitchell*, 502 F. 2d 1201 (C.A. 9, 1974); *Penney*, 439 F. 2d at 68; *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9, 1970); *Continental Bank and Trust Company* v. *Martin*, 303 F. 2d 214 (D.C. Cir. 1962). Stated otherwise, the Declaratory Judgment Act creates only a particular kind of remedy available in actions where a court already has jurisdiction to entertain a suit. Moreover, a declaratory judgment is equitable in nature, and has "not been considered within the purview of [the Customs] Court". *Matsushita*, 67 Cust. Ct. at 330. *Accord, Mitsubishi International Corporation* v. *United States*, 81 Cust. Ct. 145, C.R.D. 78–9 (1978). *Cf. Flintkote* v. *United States, supra*. Further, "[e]quity power can apply only to matters within a court's jurisdiction and cannot be exercised in disregard of the mandatory requirements of the jurisdictional statute". *Boe*, 64 CCPA at 18, n. 9.

In precisely the same situation affecting the Court of Claims, the Supreme Court held in *United States* v. *King*, 395 U.S. 1, 3 (1969), that the Declaratory Judgement Act does not apply to the Court of Claims, since "[t]his [remedy] is essentially equitable relief of a kind that the court of claims has held throughout its history, up to the time this present case was decided, that it does not have the power to grant". To paraphrase the Supreme Court in *King* "[t]his remedy is essentially equitable relief of a kind that the U.S. Customs Court has held throughout its history, up to the time this present case was decided, that it does not have the power to grant"; and accordingly, in the absence of an expressed grant of jurisdiction from Congress, I decline to assume that the Customs Court has been given the authority to issue a declaratory judgment.

Similarly, the All Writs Act, 28 U.S.C. 1651, also relied upon by plaintiff, does not give this court jurisdiction to grant plaintiff the requested relief, but may only be utilized in aid of *existing* jurisdiction,

that is to say, where the jurisdictional prerequisites of 28 U.S.C. 1582 are present. Hence, this court has consistently declined to assume jurisdiction by virtue of the All Writs Act. See the *Dexter* and *Matsushita* cases, *supra*. *Cf. Flintkote* v. *United States*, *supra; Penney*, 439 F. 2d at 68.

Finally, I have considered the recent decision in *Association of National Advertisers, Inc.* v. *Federal Trade Commission*, 460 F. Supp. 996 (D.D.C. 1978), cited by plaintiff, in which a declaratory judgment and injunction were issued by the District Court disqualifying the Chairman of the Commission from further participation in a trade regulation rulemaking proceeding on the ground of prejudice in order to prevent irrevocable tainting of all subsequent proceedings.

But the factual situation in the above-cited case is completely different from that in the present case. More to the point, however, the unique jurisdictional scheme applicable to the Customs Court precludes the judicial intervention and type of relief the District Court was able to afford plaintiffs in *National Advertisers*.

In sum, it is readily apparent that in the present case plaintiff, understandably, seeks to circumvent the statutorily prescribed prerequisites for contesting the Secretary's determination. Plaintiff's contention that it is contesting the Secretary's determination to initiate an investigation in its capacity as an American wholesaler under provisions of 19 U.S.C. 1516 is repugnant to the statute. Since plaintiff is suing as an importer, the Secretary's determination is not ripe for judicial review under 28 U.S.C. 1582(c) until plaintiff's entries of methanol have been liquidated with assessment of antidumping duties, protests have been filed and denied, and all liquidated duties, charges and exactions have been paid. Thus, under constraint of the facts and circumstances in this case, the court lacks subject matter jurisdiction *at this juncture*.[5] Therefore, we do not reach the merits of plaintiff's claim.

IX

I am painfully frustrated and disturbed by certain inabilities of this Article III Court to deal with fundamental questions of fairness affecting American manufacturers, importers and our trading partners,

[5] Although the issue was not raised in this case, I have noted that it was held by Judge Weinfeld and the Court of Appeals in *Penney* that assumption of jurisdiction by the District Court would contravene the Anti-Injunction Act, 26 U.S.C. 7421, which prohibits a suit "for the purpose of restraining the assessment or collection of any tax". Section 7421 was also mentioned by Judge Foley in *Flintkote*, *supra*. While cited in connection with the Declaratory Judgment Act and the All Writs Act, plaintiff has called attention in a footnote to the Supreme Court's decision in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In *Federal Energy*, the Supreme Court held that license fees assessed under the authority conferred on the President by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, rather than the Internal Revenue Code, are not "taxes" within the scope of the Anti-Injunction Act. Thus, there is a question as to whether antidumping duties are "taxes" within the purview of the Anti-Injunction Act. In any event, inasmuch as defendants do not rely on section 7421, the applicability of that provision in the instant case need not be decided.

who are concerned with millions of transactions, billions of dollars and significant importance of the domestic and foreign interests affected. Plainly, instances arise where a vacuum may develop with potential harsh consequences—but not alluding to the present case, where I perceive no unfairness to plaintiff resulting from the jurisdictional limitations under which this court must function. I refer, of course, to the lack of equity jurisdiction in our court[6]—quite apart from this court's need in appropriate cases to exercise such judicial authority and power. See the report of the proceedings of the *Third Annual Judicial Conference of the United States Court of Customs and Patent Appeals, May 10, 1976*, 72 F.R.D. 239, 372–378, 381–396, which strikingly illustrates the Customs Court's vital need in appropriate instances, to be statutorily clothed with equity jurisdiction. Distilling from *Dexter, supra*, 78 Cust. Ct. at 181:

> * * * It would appear that if the relevant jurisdictional statute satisfies the rudimentary constitutional requirements plaintiff's real argument is with the terms of the legislation and the final resolution of such a problem is a matter within the special competence of Congress. Congress is the proper body to consider whether the existing limitations on the jurisdiction of the court are possibly permitting the existence of inequities, which although they may not be unconstitutional, are nevertheless incompatible with our sense of fairness and the spirit of an impartial and equitable government of laws.

And compare the very recent and significant statement by Circuit Judge Friendly, writing for the unanimous Second Circuit in affirming the District Court's decision in *Flintkote:*

> * * * This case is *a fortiori* since the "more desirable remedies" sought by Flintkote are remedies which Congress advertently withheld. If American manufacturers are to have the added remedies desired by Flintkote, it must be Congress that gives them. [— F. 2d at —].[7]

I wish to extend my sincere appreciation to counsel for their excellent memoranda, which greatly aided in the expeditious disposition of this case—as requested by counsel.

For the reasons stated herein, an order was entered on March 15, 1979, granting defendants' cross-motion to dismiss for lack of jurisdiction of the subject matter, but without prejudice to renewal by plaintiff if and when the jurisdictional prerequisites can be satisfied, and denying plaintiff's motion for summary judgment.

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[6] In *Flintkote Company* v. *W. Michael Blumenthal, Secretary of the Treasury, supra*, Judge Foley stated that "I find plaintiff's assertion that the Customs Court, which is now an article III court, is without any equitable jurisdiction hard to accept. * * * Yet, it is true that the Customs Court cannot act upon Flintkote's requested relief until jurisdiction in that court is perfected. See *Dexter* v. *United States*, 424 F. Supp. 1069 (Cust. Ct. 1977)".

[7] Interestingly and parenthetically, Judge Friendly also observed in *Flintkote:*

> Mr. Justice Frankfurter once said "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors." *United States* v. *L. A. Tucker Lines*, 344 U.S. 33, 39 (1952) (dissenting opinion). See also *Yonkers* v. *United States*, 320 U.S. 685, 695 (1944) (dissenting opinion), "'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls." [— F. 2d at —, n. 6].

(C.D. 4793)

STATE METALS, INC, v. UNITED STATES

On Motion For Rehearing

ADMINISTRATIVE LAW: In judicial review of administrative action the fundamental inquiry is whether there has been compliance with the enabling legislation.

ADMINISTRATIVE LAW: On judicial review a person adversely affected by administrative action may challenge whether the administrative official has followed or complied with the necessary procedural requirements.

CUSTOMS: Notice of liquidation must comply with the pertinent statutory provisions and customs regulations, and failure to comply in all respects will result in the notice being declared legally insufficient.

CUSTOMS: Protests filed under incorrect importer's name upon reliance on a "courtesy notice of liquidation" issued by Customs held premature where imported merchandise was erroneously classified.

Court No. 76-6-01378

Port of Houston

[Judgment in part for plaintiff.]

(Decided March 28, 1979)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *John J. Mahon*, trial attorney), for the defendant.

RE, Chief Judge: Pursuant to the provisions of rule 12.1 of the rules of the U.S. Customs Court, plaintiff has moved for a rehearing, and a reconsideration of the judgment rendered in this action. Specifically, plaintiff seeks to vacate a voluntary abandonment of two Customs entries, entry Nos. 133088 and 107703, submitted to the court on an agreed statement of facts, and which resulted in the decision and judgment under reconsideration.

The decision and judgment, entered February 9, 1978, provided for the reliquidation of only one of the three entries of merchandise which were the subject matter of that action. The two entries in issue were voluntarily abandoned by the plaintiff because of the belief that their liquidation was void, as posted by the Customs Service at the port of entry, Houston, Tex., on the bulletin notice under the wrong importer's name.

In the instance of the two entries in issue, the Customs Service, in issuing Customs Form 4333–A. Notice of Entries Liquidated, listed the

name of the importer as Winter-Wolff International Corp., rather than State Metals, Inc., the plaintiff herein. State Metals, Inc., was formerly known as State Metals Division, Winter-Wolff International Corp. This notice of liquidation, which was sent to plaintiff, is called informally a "courtesy notice." In response to that notice, plaintiff's attorney filed a protest contesting the classification of the merchandise with the name of the importer of record as Winter-Wolff International Corp., as indicated in Customs Form 4333–A, Notice of Entries Liquidated.

Unknown to the importer's attorney, however, the bulletin notice of entries liquidated, Customs Form 4333, posted in Houston, Tex., had the correct importer's name, State Metals, Inc., and only the "courtesy notice," Customs Form 4333–A, had the incorrect name. As a consequence of the mailing and reliance upon the "courtesy notice," plaintiff, State Metals, Inc., failed to file a protest within 90 days from the bulletin notice of entries liquidated, form 4333, posted in Houston, Tex.

After completion of the administrative proceedings before the Customs Service, a civil action was instituted, in the name of State Metals, Inc., contesting the classification of the merchandise on all three entries. The action resulted in an agreement between the parties that the merchandise had been improperly classified by the Customs Service, and a proposed stipulation was drafted which reflected its lawful and proper classification.

There is no question on the substance or merits of the classification of the merchandise. The defendant conceded that the merchandise, including the two entries in dispute, had been improperly classified, and, hence, consented to submit the action on an agreed statement of facts.

Before executing the agreed statement of facts, however, the defendant objected to the inclusion of two of the three entries, asserting that the court lacked jurisdiction. Defendant contended that, as to the two entries, the importer was Winter-Wolff International Corp., a separate corporation distinct from the importer of record in the civil action, i.e., State Metals, Inc.

Plaintiff apparently agreed with defendant's assertion as to the court's lack of jurisdiction. Nevertheless, it responded that the liquidation of the two entries was legally insufficient since the "courtesy notice," form 4333–A, and presumably the posted notice of liquidation, form 4333, were in the name of Winter-Wolff International Corp.

Plaintiff, following the procedure indicated by the defendant, abandoned the two entries, and submitted the agreed statement of facts, and proposed decision and judgment, as to only one of the entries.

After the decision and judgment was entered, plaintiff wrote the district director of the U.S. Customs Service in Houston, Tex., asking

that the administrative error be corrected, and that liquidation be completed in the name of State Metals, Inc. The customs officials in Houston, by letter, informed plaintiff's counsel that the name listed on the Customs Form 4333, Bulletin Notice of Entries Liquidated, posted at the port of entry was State Metals, Inc. After receipt of this letter, plaintiff's attorney filed the present motion for rehearing and reconsideration. With the consent of defendant's counsel, it requested oral argument on the motion.

The defendant has submitted an affidavit by a supervisory ministerial clerk at the customhouse in Houston which states in part:

> "Cayetano Carrillo, Jr., being duly sworn, deposes and says
>
> 1. That I am Supervisory Ministerial Clerk, U.S. Customs Service for the Houston District, and as such am in charge of maintaining the Bulletin Notice of Liquidation.
>
> 2. That during the year 1975, including the period from October 24, 1975, through October 31, 1975, it was the uniform practice of the Houston District to make a comparison of the computerized Bulletin Notice as received from Silver Spring, Md., with the importer of record information as shown on the entry, Customs Form 7501, prior to posting the Bulletin Notice of Liquidation.
>
> 3. That the Bulletin Notice of Liquidation of entry 107703 * * * was in fact posted in the form shown.
>
> 4. That the Bulletin Notice of Liquidation for entry 133088 * * * was in fact posted in the form shown.
>
> 5. That the name of importer of record may differ on the Bulletin Notice of Liquidation from the name of importer of record on Customs Form 4333–A, Notice of Entries Liquidated, for entry 107703 and entry 133088.
>
> 6. That the reason for such a difference is that the names of importer of record were changed on the Bulletin Notice of Liquidation, prior to posting, so as to conform to the names shown on the entries."

The defendant opposes plaintiff's requested relief and asserts that the liquidations of the entries were proper. It contends that, as verified by the affidavit of the Houston customs official, there have been valid liquidations completed in compliance with the applicable regulations.

The question presented, therefore, is whether, on these particular facts, the plaintiff-importer received a legally sufficient notice of liquidation.

Section 500 of the Tariff Act of 1930, as amended, which governs appraisement, classification, and liquidation procedures provides that:

> *"The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—*
>
> (a) appraise merchandise in the unit of quantity in which the merchandise is usually bought and sold by ascertaining or estimating the value thereof by all reasonable ways and

means in his power, any statement of cost or costs of production in any invoice, affidavit, declaration, or other document to the contrary notwithstanding;

(b) ascertain the classification and rate of duty applicable to such merchandise;

(c) fix the amount of duty to be paid on such merchandise and determine any increased or additional duties due or any excess of duties deposited;

(d) liquidate the entry of such merchandise; and

(e) *give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.*" [Italics added.]

The Secretary of the Treasury has prescribed the "form and manner" for giving notice of liquidation of formal entries in the customs regulations.

The following are the pertinent regulations which were issued by the Secretary (38 F.R. 17443, 17483, issued July 2, 1973), effective August 1, 1973:

"*§ 159.9 Notice of liquidation and date of liquidation for formal entries.*

(a) *Bulletin notice of liquidation. Notice of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333 or 4335:*

(1) *Customs Form 4333.* Customs Form 4333 shall be used for the following types of entries:

(i) Dutiable consumption entries;

(ii) Free consumption entries liquidated as dutiable;

(iii) Warehouse entries;

(iv) Drawback entries;

(v) Vessel repair entries;

(vi) Appraisement entries;

(vii) Permanent exhibition entries liquidated as dutiable; and

(viii) Other entries for which a bulletin notice of liquidation is required and for which Customs Form 4335 is not appropriate.

* * * * * * *

(b) *Posting of bulletin notice. The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.* [Italic added.]

(c) *Date of liquidation.* The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. The entries for which the bulletin notice of liquidation has been prepared shall be stamped "Liquidated," with the date of liquidation, which shall be the same as the date of the bulletin notice of liquidation. Such stamping shall be deemed the legal evidence of liquidation."

Plaintiff contends that the Customs Form 4333–A, Notice of Entries Liquidated, is customarily and routinely issued by the Customs Service, and that this notice is relied upon by importers. Specifically, it explicitly states that this notice was received and relied upon in the present action to file the protest which challenged the classification of the imported merchandise in the three entries.

Whether there has been compliance with the enabling legislation is the fundamental inquiry in all judicial review of administrative action. A person adversely affected by administrative action may also challenge whether the administrative official has followed the necessary procedural requirements. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413–14, 91 S. Ct. 814, 822 (1971) and cases cited in Schwartz, *Administrative Law* 157–60 (1976).

There is no doubt that the Customs Service, under the governing statute and the applicable regulations, is required to give a final notice of liquidation. The law is clear that the final notice of liquidation must comply with the pertinent statutory provisions and Customs regulations. Judicial decisions teach the importance of full compliance, and that a failure to comply in all respects will result in the notice being declared insufficient.

In *The Lansdowne Distillery* v. *United States*, 39 Cust. Ct. 190, C.D. 1925 (1957), although a notice of liquidation of an entry had been posted, the importer was not given access to the entry papers which contained the facts upon which the collector based his action. This court held the notice of liquidation to be incomplete, and tolled the statutory period of time until the importer was afforded the opportunity to be apprised of the facts of the liquidation. Of special importance is the statement of the court that, "[w]here an administrative agency over a long period of time establishes a practice of informing persons who have business before the agency of their obligations to the agency, such persons are entitled to assume that the established practice will be followed, in the absence of notice that it has been discontinued." 39 Cust. Ct. at 195. See *Service* v. *Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S. Ct. 968 (1959). See also cases cited in *United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1970).

At the oral argument on the present motion for rehearing, counsel for the parties agreed that the Customs form 4333–A, i.e., the notice of entries liquidated, has been issued regularly for the past eight years by the Customs Service, and that it is known by the Customs Service that it is relied upon by the importer or his agent. Indeed, the very purpose for its issuance is to give advance notice of the liquidation of an entry. It is also apparent that, as in this case, the "courtesy notice" may serve as the only notice upon which the decision to protest is based.

In *The Diamond Match Company* v. *United States*, 45 Cust. Ct. 198, C.D. 2223 (1960), the issue before this court was whether the inaccurate filing of a protest because of a change in corporate name from the Diamond Match Co. to Diamond National Corp. was such an error as to invalidate it. The protest was filed in the name of The Diamond Match Co., an American manufacturer. On appeal, the Court of Customs and Patent Appeals agreed with this court's holding that it did not, and quoted with approval its statement that "[t]he inaccuracy of the name used in the protest was not such as to fail to disclose the real party in interest or to mislead the importer or the Government." *The Diamond Match Company* v. *United States*, 49 CCPA 52, 57, C.A.D. 796 (1962).

Notwithstanding the fact that the "courtesy notice" listed Winter-Wolff International Corp., as the importer, it was State Metals, Inc., which received it and filed the protest. On the facts presented, no intention to mislead the Government can be ascribed to the plaintiff since its corporate name had recently included the name of Winter-Wolff International Corp. Moreover, it was possible for the defendant, prior to issuing the "courtesy notice," to have established, as it did thereafter from the entries in its possession, that State Metals, Inc., not Winter-Wolff International Corp., was the real party in interest. Its subsequent discovery of that fact, in time to correct Customs Form 4333, did not cure the defect on Customs Form 4333–A, nor undo the reliance placed upon it.

In *Lorraine Fibre Mills, Inc.* v. *United States*, 38 Cust. Ct. 94, C.D. 1848 (1957), the question presented was whether the customs officials, under the statutory and regulatory provisions, followed the proper "form and manner" of "conspicuously" posting a notice of liquidation.

The pertinent facts established that the bulletin notices of liquidation for the entries at the customhouse were contained in folders, usually displayed in the public rooms, and the entries were on a desk. Since the entry in issue was not listed on the sheets in the folders, or available at the desk, the court held that the notice of liquidation was insufficient. The court stated:

> "According to section 505 (predecessor provision to sec. 500) of the Tariff Act of 1930, the collector is required to give notice of liquidation in the form and manner prescribed by the Secretary of the Treasury. The regulations in effect at the time of this entry provided that liquidated entries be immediately scheduled on a bulletin notice of liquidation; that such notice be posted as soon as possible in a conspicuous place in the customhouse or lodged in some suitable place there in such manner that it could be readily located and consulted by interested parties.
>
> The provisions of section 505, *supra*, are mandatory and give no discretion to collectors either as to the form or manner of

> notice, and the regulations requiring posting or lodging in a conspicuous place have the force and effect of law." 38 Cust. Ct. at 99.

The question of legal sufficiency and validity of the notice of liquidation was also presented in *United States* v. *Astra Bentwood Furniture Co.*, 28 CCPA 205, C.A.D. 147 (1940). In the bulletin notice of liquidation, the name of the importer, Astra Bentwood Furniture Co., appeared as "Astringent Wood Furniture Co." The court held that the notice was insufficient and void since the name of the importer, and the date of entry appearing on the notice were incorrectly stated.

It is not questioned that a notice of liquidation issued pursuant to section 500 of the Tariff Act of 1930, as amended, must be in the form and manner prescribed by the Secretary of the Treasury in the Customs regulations. It is also clear these requirements are mandatory, and customs officials do not possess discretion to vary either the "form or manner" for the giving of notice.

The defendant contends, however, that "Customs Form 4333–A has no significance under the statute or the mandatory regulations and whether plaintiff relied upon it or not in preparing the protest to be filed is immaterial." It also asserts that plaintiff "had no right to rely completely on the 'courtesy notice' in preparing the protest to be filed." In support of its contention, defendant relies on the case of *Henry A. Wess, Inc.* v. *United States*, 57 Cust. Ct. 139, C.D. 2743 (1966), *aff'd*, 54 CCPA 77, C.A.D. 910 (1967).

In the *Wess* case, the question presented pertained to the posting practices employed at the port of Cincinnati, Ohio. The defendant maintained that the notices of liquidation in issue had been duly posted in a legally sufficient manner in accordance with the pertinent statutory and regulatory provisions of law. Plaintiff contended that notices were customarily posted in sequence, except for the particular entry in issue dated September 24, 1962. There was no doubt that the notice was in fact posted on September 24, 1962. Plaintiff's allegation pertained only to whether it had been posted in sequence.

Having found that "plaintiff has adduced no evidence to establish that the * * * notice was not posted in sequence by the collector on September 24, 1962, in keeping with his customary practice," the Customs Court decided for the defendant. In affirming the judgment in favor of the defendant, the Court of Customs and Patent Appeals held:

> On the basis of the record before us, we must agree with the Customs Court that the evidence fails to establish a lack of compliance with the statutory and regulatory provisions relative to the posting of liquidation notices affecting the involved entries. 54 CCPA at 80.

After referring to the governing statute and regulations, the appellate court uttered the dictum that "[t]here is no requirement that the notices be posted in any sequence," and added:

> The practice in vogue of posting in sequence is clearly an accommodation and convenience to interested persons, which does not serve to enlarge or broaden the mandatory requirement of the law. 54 CCPA at 80.

It is clear that the holding in *Wess* turned on the evidence presented at the trial. The appellate court referred to the presumption that public officials have discharged their duties in accordance with the applicable laws and regulations, and that the burden rested "upon the importer to rebut that presumption by competent evidence." The court agreed with the Customs Court that the regulations were reasonable, and concluded that:

> In our opinion appellant has failed to rebut this presumption but, even independently thereof, the evidence of record is not, in our view, sufficient to establish that the notice under consideration was not posted in accordance with applicable law. *Id.* at 81.

The *Wess* case is readily distinguishable since its holding was based on the finding that plaintiff had adduced no evidence to establish its allegation. In the case at bar there is no question of insufficiency of proof. The defendant has acknowledged the error in the name of the party on the "courtesy notice." While it corrected the name of the importer from Winter-Wolff International Corp. to State Metals, Inc. on Customs Form 4333, it did not correct the "courtesy notice." Since it knew that the "courtesy notice" was relied upon by importers, the defendant cannot now be heard to say that plaintiff should not have relied upon it.

The defendant can derive no comfort from the admission in the affidavit of the Customs official that, after learning of the error, the posted notice was corrected. The importance of the "courtesy notice" was known to the Customs officials. To have corrected the name of the importer on the posted notice without correcting the mailed notice was prejudicial to the rights of the importer.

Under the circumstances, the court should not remain powerless to relieve the importer from the resulting hardship in a case in which the defendant concedes that the classification is erroneous. There is abundant judicial authority for the principle that, whenever possible, if the hardship is substantial the law will seek to prevent an injustice or inequity. Mr. Justice Cardozo, as chief judge of the Court of Appeals of the State of New York, in a case dealing with forfeitures, expressed the thought with characteristic eloquence when he stated, "[l]et the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path." *Graf*

et al. v. *Hope Building Corp.*, 254 N.Y. 1, 13, 171 N.E. 884, 888 (1930) (dissenting).

In cases involving fundamental legal rights it is also necessary to recall the relationship between the requirement of notice and the demands of due process. In the words of Mr. Justice Jackson in the case of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-70 S. Ct. 652, 657 (1950): "An elementary and fundamental require, ment of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * The notice must be of such nature as reasonably to convey the required information, * * * and it must afford a reasonable time for those interested to make their appearance * * *." See also *United States* v. *Lee*, 106 U.S. 196, 220, 1 S. Ct. 240, 261 (1882), in which Mr. Justice Miller, after proclaiming the supremacy of law in our form of government, added:

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government * * *.

In situations in which the agency decisions must afford a proper notice of action to be taken or which has been taken, it has been stated that, "[n]ot every form of official misinformation will be considered sufficient to estop the Government. * * * Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the Government may be estopped from disavowing the misstatement." *Brandt* v. *Hickel*, 427 F. 2d 53, 56 (9th Cir. 1970).

In *Point Four Ltd., Inc.* v. *United States*, 78 Cust. Ct. 190, 431 F. Supp. 1254 (1977), the Government moved to dismiss on the ground that the protests had not been timely filed. The importer opposed the motion because it had been advised by the Customs officials in Toledo, Ohio, that the protests should properly be filed in the Chicago office. In denying defendant's motion to dismiss, Judge Richardson stated that, "* * * the rights of importers will not be forfeited, as a consequence of deceptive or improper practices indulged in by Customs officials. * * * If full credence be given to the allegations in the third paragraph of the complaint in this case it is clear that the ends of justice as well as the objective of the statute of limitations will be ill served by a declination of jurisdiction on the part of the court." 78 Cust. Ct. at 191-92. See also *Wolf D. Barth Co., Inc.* v. *United States*, 81 Cust. Ct. 127, C.D. 4778 (1978).

In *Reliable Chemical Company* v. *United States*, 81 Cust. Ct. 154, C.R.D. 78-11 (1978), *appeal pending*, a mailed notice of liquidation,

Customs Form 4333–A, was dated prior to the date of liquidation. As a consequence, the protest was filed before the effective date of the liquidation as stated on the notice. Judge Watson, writing for this court, stated:

> It would be improper for defendant, having chosen this form of notice, to then fall back on its regulations and attack the natural, reasonable and diligent response of plaintiff as premature under the law and it would be unjust for a court to sanction such conduct.
>
> The law is designed to provide judicial review of administrative decisions, not to magnify the importance of regulations which the agency itself obfuscates or contradicts by its actions, however well-intentioned they may be. *Cf. Colonna & Co., Inc.* v. *United States*, 75 Cust. Ct. 179, C.R.D. 75–4, 399 F. Supp. 1389 (1975).

As stated in the case of *Colonna & Co., Inc.* v. *United States*, 75 Cust. Ct. 179, 184, 399 F. Supp. 1389, 1393 (1975):

> Exculpatory explanations cannot be asserted against a party who, in justifiable reliance upon instructions received from an authoritative source, has changed his position to his detriment.

It has been agreed and stipulated that the imported merchandise has been erroneously classified, and that, as a consequence, the importer is entitled to moneys illegally exacted.

Based upon a stipulation of the parties, pursuant to the decision and judgment of this court now under reconsideration, one of three entries in this action has been reliquidated. Except for the misadventure caused by the "courtesy notice" upon which the importer relied, all of the entries would have been reliquidated. This alone has prevented the importer from receiving a return of the monies to which it is lawfully entitled.

On the particular facts presented, it is the determination of the court that there has been no valid liquidation of the two entries in dispute within the purview of section 514 of the Tariff Act of 1930, as amended. Thus, insofar as they relate to those two entries, the present protests are premature.

This determination renders it unnecessary to reach the question raised by the defendent that the protests in issue were filed by a party unauthorized by statute.

In view of the foregoing, the decision and judgment of February 9, 1978, with respect to entry Nos. 133088 and 107703 is rescinded and those entries are to be returned to Houston, Tex., the port of entry, so that the Customs officials may complete the required liquidation.

Judgment will be entered for the plaintiff in accordance with this opinion.

(C.D. 4794)

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC., LIBBEY-OWENS-FORD COMPANY, AND C E GLASS, PLAINTIFFS v. UNITED STATES, DEFENDANT

On Plaintiffs' Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 77-5-00879

[Plaintiffs' motion granted; defendant's cross-motion denied.]

(Decided March 29, 1979)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Branch Director; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *John J. Mahon* and *Sidney N. Weiss*, trial attorneys), for the defendant.

MALETZ, Judge:

Introduction

Plaintiffs are domestic manufacturers and wholesalers of float glass. In 1974 they filed with the Commissioner of Customs a petition under 19 U.S.C. 1303, alleging that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of float glass in Italy or upon the exportation of float glass from Italy. Included among the alleged bounties or grants described in plaintiffs' petition were certain benefits received by float glass manufacturers in Italy under various regional development programs administered by the Italian Government, including investment grants, low-interest rate financing, and the reduction of the contribution to state welfare organizations by the float glass manufacturers. These benefits were more than *de minimus*, and were paid in respect of expenditures incurred by float glass producers in the creation or expansion of float glass production facilities in certain regions of Italy.

Thereupon, the Secretary of the Treasury conducted an investigation and published, on July 3, 1975, a "Notice of Preliminary Countervailing Duty Determination" in the Federal Register which read in part (40 F.R. 28105):

> On the basis of an investigation conducted pursuant to § 159.47 (c) Customs regulations (19 C.F.R. 159.47(c)), it has tentatively been determined that benefits have been received under various programs maintained by the Italian Government. These include Government assistance in the form of investments [sic] grants, low-interest rate financing, and other incentives for facilities

located in economically depressed areas, as well as preferential financing available outside the economically depressed areas.

Benefits derived from programs such as those which are the subject of this investigation can, in some circumstances, constitute bounties or grants within the meaning of the law. Since the information thus far made available concerning these programs has not been sufficient to permit a thorough analysis of their nature and effect, it has been determined preliminarily that imports of float glass from Italy benefit from the payment or bestowal of a bounty or grant directly or indirectly, within the meaning of the [sic] section 303 of the Tariff Act of 1930, as amended, by reason of the incentive programs mentioned above.

Thereafter, an "Amendment to Notices of Preliminary Countervailing Duty Determinations" was published on August 15, 1975 (40 F.R. 34423), extending the time within which the public could make submissions.

On January 7, 1976, the Treasury Department published in the Federal Register a "Notice of Final Countervailing Duty Determination" which provided (41 F.R. 1274):

> After consideration of all information received, it has been determined that imports of float glass from Societa Italiana Vetro, S.p.A. and Fabbrica Pisana, S.p.A. benefit from the payment or bestowal of bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) by reason of various incentive programs including investment grants, special tax reductions, low-interest rate financing and the reduction of the contribution to state welfare organizations by the float glass manufacturers. It aso [sic] has been determined that float glass produced by Verrera di Vernante, S.p.A. does not benefit from the payment or bestowal of bounties or grants. Accordingly, notice is hereby given that float glass imported directly or indirectly from Italy produced by Societa Italiana Vetro, S.p.A. (SIV) and Fabbrica Pisana, S.p.A. (Pisana), entered or withdrawn from warehouse for consumption on or after January 7, 1976, will be subject to payment of countervailing duties equal to the net amount of any bounty or grant determined or estimated to have been paid or bestowed. This determination is based on the best information available, since the three firms named above have declined to provide any detailed information regarding the benefits they have received under these programs.
>
> In accordance with section 303, until further notice the net amount of such bounties or grants under the information presently available has been estimated to be 10 percent *ad valorem* for float glass produced by Societa Italiana Vetro, S.p.A. and Fabbrica Pisana, S.p.A. Declarations of the net amount of the bounties or grants ascertained and determined, or estimated, to have been paid, directly or indirectly, upon the manufacture, production, or exportation of float glass from Italy manufactured by SIV and Pisana will be published subsequently in the *Federal Register*.

Effective on January 7, 1976, and until further notice, upon entry for consumption or withdrawal from warehouse for consumption of such dutiable float glass from Italy manufactured by SIV and Pisana imported directly or indirectly from Italy which benefits from such bounties or grants, there shall be collected, in addition to any other duties estimated or determined to be due, countervailing duties in the amount ascertained in accordance with the above declaration.

The liquidation of all entries for consumption or withdrawals from warehouse for consumption of such dutiable float glass from Italy manufactured by SIV and Pisana imported directly or indirectly from Italy which benefits from such bounties or grants and is subject to the order shall be suspended pending declarations of the net amounts of the bounties or grants paid or bestowed. A deposit of the estimated countervailing duty, in the amount of 10 percent *ad valorem* for float glass from Italy manufactured by SIV and Pisana shall be required at the time of entry for consumption or withdrawal from warehouse for consumption.

Following the publication of this countervailing duty determination, the Secretary of the Treasury or his delegate, without having given any notice to the plaintiffs or to the public, engaged in a series of communications with representatives of the Italian Government to elicit information from the Italian Government which would have enabled the Secretary of the Treasury or his delegate to consider further whether bounties or grants were received by Societa Italiana Vetro. S.p.A. (SIV).

On March 8, 1977, without any advance notice having been given to the plaintiffs or to the public, a notice was published by the Treasury Department in the Federal Register, 42 F.R. 13016–17, T.D. 77–77, which modified the countervailing duty determination of January 7, 1976, by excluding therefrom float glass from Italy produced by SIV. The notice stated in pertinent part:

Because SIV and Pisana declined to provide any detailed information prior to the aforementioned determination regarding the benefits each received, the determination was based on the best information available, and the net amount of the bounties or grants was estimated at 10 percent ad valorem for float glass produced by both companies. Effective on January 7, 1976, liquidation was suspended of all entries for consumption or withdrawals from warehouse for consumption of such dutiable float glass produced by SIV and Pisana imported directly or indirectly from Italy which benefits from such bounties or grants.

Information has now been received with respect to SIV which permits a more complete analysis of the alleged bounties and grants. Under various regional development programs administered by the Government of Italy, it now appears that an investment grant preferential financing and a reduction in the required contribution to the state welfare organization have been given to SIV. No special tax reductions have been utilized by

SIV. The Italian Government has advised the Treasury Department that the benefits received by SIV have the effect of offsetting disadvantages which would discourage SIV from moving to and expanding in less prosperous regions. Inasmuch as SIV sells a preponderance of its production in the European Community—more than 97 percent in 1975—the level of its exports outside the European Community is a small percentage of its production, and the amount of assistance provided by the government programs to SIV totaled less than three percent of the value of float glass it produced, those benefits are not regarded as bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).

For the reasons stated above, it is hereby determined that no bounty or grant is being, or has been, paid or bestowed directly or indirectly, upon the manufacture, production, or exportation of float glass from Italy produced by Societa Italiana Vetro, S.p.A. within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), and T.D. 76–9 is hereby modified so as to exclude float glass from Italy produced by SIV.

Accordingly, it has been ascertained, determined or estimated and hereby declared, that the net amount of the bounty or grant paid or bestowed upon the subject merchandise produced by SIV is 0 percent ad valorem, and no countervailing duties will be collected upon the liquidation of entries of the subject merchandise for consumption or withdrawals from warehouse for consumption for the period January 7, 1976, through the date of publication of this notice in the Federal Register. Furthermore, the order to suspend liquidation of all entries for consumption or withdrawals from warehouse for consumption of the subject merchandise produced by SIV, is hereby revoked.

Pursuant to 19 U.S.C. 1516(d), plaintiffs, American manufacturers and wholesalers of the same class or kind as the merchandise the subject of the Secretary of the Treasury's negative countervailing duty determination regarding float glass from Italy produced by SIV, filed, on March 25, 1977, a timely notice of their desire to contest that determination. On May 13, 1977, the Secretary of the Treasury caused publication of plaintiffs' notice to be made in the Federal Register, 42 F.R. 24347–48 (1977), and on May 31, 1977, plaintiffs instituted the present action.

The Statutes

The statutes relevant to the action are as follows:

Section 303 of the Tariff Act of 1930, as amended by section 331 of the Trade Act of 1974, 88 Stat. 2049 (19 U.S.C. 1303):

Countervailing duties—

Levy of countervailing duties.

(a)(1) Whenever any country, dependency, colony, province, or other subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or in-

directly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

* * * * * * *

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed,

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within 6 months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within 12 months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

* * * * * * *

Section 516 of the Tariff Act of 1930, as amended by section 321 (f)(1) of the Trade Act of 1974, 88 Stat. 2048 (19 U.S.C. 1516):

Petitions by American Manufacturers, Producers, or Wholesalers * * *

* * * * * * *

(d) *Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.*

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the U.S. Customs Court contesting such determination.

* * * * * * *

Section 1582 of Title 28, 28 U.S.C. 1582 (1970):

Jurisdiction of the Customs Court

* * * * * * *

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

Question

The question presented is whether the bestowal by the Italian Government, under various so-called regional development programs, of certain pecuniary benefits, which are more than *de minimis* in magnitude, upon the manufacture or production of float glass in Italy by SIV constitutes the payment or bestowal of bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).

The Facts

The essential facts—which are not in dispute—show that the benefits alleged to be bounties or grants in this action were conferred under a regional development program administered by the Italian Government. Italian Law No. 646 of August 10, 1950, established a plan for developing the industry and commerce of southern Italy, know as the Mezzogiorno, which has been economically and socially depressed for centuries. That law was modified by Italian Law No. 853 of October 6, 1971, which provided various programs of economic assistance. Administration and financing of these programs are handled through a number of financial institutions, such as the Cassa per il Mezzogiorno (Cassa), ISVEIMER (Instituto per lo Sviluppo Economica dell'Italia Meridionale), IRFIS (Instituto Regionale per il

Finanziamento alle Industrie in Sicilia), CIS (Credito Industriael Sardo), and the large regional commercial banks.

Through these regional development programs, three types of benefits were provided for a floatglass facility SIV established in 1974 in San Salvo, Italy, which is located in the Mezzogiorno. These benefits were as follows:

1. *Investment grant.*—The Cassa is authorized to make capital grants toward the creation of new industrial establishments. The size of the grant is dependent upon the amount of the fixed investment involved. For investments up to 1.5 billion lire (I.L.), a grant of 35 percent (45 percent for facilities in certain designated areas) is available for construction, renovation, conversion, transformation, reactivation, and enlargement of industrial facilities. For investments from 1.5 to 5 billion lire, available capital grants range from 15 to 20 percent, and for investments over 5 billion lire, they range from 7 to 12 percent. All three of the above classes can receive additional grants up to 5 percent of fixed investment for construction of certain infrastructure projects or for training programs, and additional grants up to 10 percent for purchase of machinery and equipment manufactured in the Mezzogiorno.

Pursuant to this authorization, SIV applied for, and received sometime in mid-1976, a grant from the Cassa for its San Salvo facility.

2. *Preferential financing.*—Under Italy's regional development program, reduced rate, medium-term loans are available for the creation of new industrial establishments. The maximum amount of any loan is dependent on the size of the investment. Investments of up to 1.5 billion lire are eligible for loans up to 35 percent of the cost of fixed equipment and inventories of raw or semifinished materials. Loans from 35 to 50 percent are available for investments of more than 5 billion lire. Loans for new plants are for 15 years and those for expansion, renewal, transformation, or reactivation of existing plants are for 10 years.

SIV received a 10-year loan at 7.5 percent interest from IMI (Instituto Mobiliare Italiano) for its San Salvo facility. The commercial rate at that time for comparable loans was 10.5 percent.

3. *Reduction in the required contribution to the state welfare organization.*—Through the end of 1980, industries which establish new facilities in the Mezzogiorno are entitled to a reduced contribution to INPS (the state-run welfare organization). The contribution of qualified enterprises is limited to 30 percent of salaries paid and 16 to 20 percent of total labor cost.

The Italian Government indicated that SIV's labor cost savings from this benefit are 11.7 percent.

The parties agree that the benefits received by SIV, as described

above, upon the manufacture or production of float glass were more than *de minimis*.

The record also shows that at the time of the issuance of notice of final rate and modification of the countervailing duty order with respect to float glass from Italy, the Treasury Department had before it information which indicated: (1) That the benefits in question had a value of "less than 3 percent" (i.e., 2.47 percent) of the value of float glass produced by SIV; (2) that in 1975, SIV's exports were 18.6 percent of production; (3) that in 1975, SIV sold more than 97 percent of its production in the European Community; and (4) that in 1975 SIV exported approximately 3 percent of its production outside of the European Community.

Opinion

Against this background, plaintiffs contend that the foregoing Italian regional development programs clearly result in the payment or bestowal of bounties or grants upon the manufacture or production of float glass in Italy within the meaning of section 303 of the Tariff Act of 1930, as amended. Defendant, on the other hand, argues that section 303 was intended to reach only those programs which distort international trade and that plaintiffs have failed to demonstrate that the alleged bounties or grants possess these requisite effects. For the reasons that follow, it is concluded that these Italian regional development programs result in the payment of bounties or grants upon the manufacture or production of float glass in Italy within the contemplation of section 303 and that defendant's argument is lacking in merit.

At the outset, it is to be observed that the language of section 303 is mandatory. Thus, whenever a bounty or grant has been conferred, the Secretary "must" impose countervailing duties. In this connection, the first countervailing duty law of "general" application [1] was enacted as section 5 of the Tariff Act of 1897, 30 Stat. 151, 205, and provided:

> SEC. 5. That *whenever any country*, dependency, or colony *shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation* of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is

[1] More particularly, the Supreme Court pointed out in *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978) that "[t]he language of the 1897 statute evolved out of two earlier countervailing duty provisions that had been applicable only to sugar imports." It is to be added that the first of these two provisions was contained in sec. 237 of the Tariff Act of 1890, 26 Stat. 584; the second was enacted in 1894. Par. 182¼ of the Tariff Act of 1894, 28 Stat. 521.

> imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, *there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.* The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties. [Italic added.]

The law was reenacted, virtually without change, in 1909 (sec. 6 of the Tariff Act of 1909, 36 Stat. 11, 85) and in 1913 (sec. IV, par. E of the Tariff Act of 1913, 38 Stat. 114, 193). In 1922, the statute was expanded to cover bounties or grants upon "manufacture or production," as well as bounties or grants upon export. Section 303 of the Tariff Act of 1922, 42 Stat. 935. The 1922 version was reenacted in 1930, without changes that are relevant here (sec. 303 of the Tariff Act of 1930, 46 Stat. 687) and in 1975 (sec. 331(a) of the Trade Act of 1974, 88 Stat. 2049).

To summarize, the countervailing duty provision in the Tariff Act of 1897 was basically similar to the present section 303 save for one essential feature: The provision in the 1897 act applied only to bounties or grants upon "exportation," whereas the present statute—stemming from the 1922 amendment—is applicable not only to bounties or grants upon exportation but also to bounties or grants upon "manufacture or production." See *Zenith*, *supra*, 437 U.S. at 461, n. 18.

The Downs and Nicholas Cases

Prior to the 1922 amendment, two significant cases were decided with respect to the then existing law, namely, *Downs* v. *United States*, 4 T.D. 405, T.D. 22984, G.A. 4912 (1901), *aff'd*, 113 Fed. 114 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States*, 29 T.D. 59, T.D. 35595 (1915), *aff'd*, 7 Cust. Ct. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919). *Downs* involved an elaborate scheme of the Russian Government to control the marketing of sugar. Under this scheme, a limited portion of a refiner's production was labeled as "free" sugar and could be sold subject to an excise tax of 1.75 rubles per pood. A greater portion of the refiner's production was labeled as "surplus" sugar and could be sold on the domestic market only upon payment not only of the excise tax of 1.75 rubles per pood, but of an additional tax of 1.75 rubles per pood, or a total of 3.50 rubles per pood. If the refiner exported sugar, he received not only a rebate of the excise tax he would have had to pay if he sold domestically, he also received a certificate allowing him to sell an

amount of "surplus" sugar equal to the amount of sugar exported as "free" sugar, thus avoiding payment of the additional excise tax. Alternatively, this certificate could be sold to other domestic sugar refiners.

Based on this factual setting, the courts in *Downs* held that the combination of the exemption with the certificates was an export bounty within the meaning of the 1897 statute. See *Zenith*, *supra*, 437 U.S. at 459–462.

With respect to the meaning of the terms "bounty" and "grant," the following statements of the Fourth Circuit in *Downs*—which adopted the decision of the Board of General Appraisers—are pertinent (113 F. at 147):

> The word "bounty," in its ordinary signification, may be defined to be "an additional benefit conferred upon, or a compensation paid to, a class of persons." 1 Bouv. Law Dict. (Ed. 1897) p. 260.
>
> * * * * * * *
>
> It is important to observe, in the consideration of this subject, that section 5 of the tariff act of 1897, under which this case arises, does not use the word "bounty" in any narrow or technical meaning. It embraces "any bounty or grant" bestowed or conferred by the Government, whether directly or indirectly. The word "grant" is more comprehensive in meaning than the term "bounty". It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons. * * *

It is to be noted that in *Downs*, as the Supreme Court stated, "the main argument of the * * * (importer) * * * (was) addressed to the proposition that this bounty is paid not upon exportation, but upon production." 187 U.S. at 512.[2] Addressing itself to this contention, the Court declared (187 U.S. at 512–3):

> The answer to this is that every bounty upon exportation must, to a certain extent, operate as a bounty upon production, since nothing can be exported which is not produced, and hence a bounty upon exportation, by creating a foreign demand, stimulates an increased production to the extent of such demand. Conversely, a bounty upon production operates to a certain extent as a bounty upon exportation, since it opens to the manufacturer a foreign market for his merchandise produced in excess of the demand at home. A protective tariff is the most familiar instance of this, since it enables the manufacturer to export the surplus for which there is no demand at home. If there were no tariff at all, and the expense of producing a certain article at home were materially greater than the expense of producing the same article abroad, there would be none produced, and, of

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[2] As the Supreme Court noted in *Zenith*, *supra*, 437 U.S. at 461, n. 18:

* * * This latter argument [in *Downs*] was based on the fact that the 1897 statute covered only bounties on exportation and not those on production. In 1922, Congress amended the statute to cover bounties on production and manufacture as well as exportation. Tariff Act of 1922, *supra*, n. 8.

course, none to export. But with the aid of such tariff production would be stimulated, and might become so much greater than the home demand, that a manufacturer would look to foreign markets for his surplus. In the case of Russian sugar the effect of the import duties is much enhanced by the fact that, the supply of free sugar from the home market being limited, the selling price is very remunerative, and each producer has therefore an interest in placing as much sugar as he can on the home market; and as the total amount of free sugar is distributed among all the manufactories in proportion to their entire production, it may become to their interest to export their surplus even at a loss, if such loss can be compensated by the profits on sugar sold in the home market. This would not make the tariff a bounty upon exportation, but a mere incident to its operation upon production. But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; but where in addition to that these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation.

In the *Nicholas* case the British Government exempted exporters of spirits from paying certain domestic excise taxes and also made an allowance to such exporters of 3d. or 5d. per gallon, depending on the spirits exported. The Board of General Appraisers, the Court of Customs Appeals and the Supreme Court all agreed that this program constituted a bounty or grant within the meaning of the countervailing duty statute. In this connection, the Board emphasized that it is only the "effect" and not the "purpose" of a foreign statute that may be inquired into by the courts. Thus, as the Board made clear, if the effect of any such law is to bestow a bounty or grant upon the exporter of merchandise to the United States, then a countervailing duty must be assessed. Specifically, the Board observed (29 T.D. at 61–62):

> The policy or purpose of the British law is not a subject with which we can deal. In the wisdom of the British lawmakers the complicated provisions of this statute were doubtless deemed necessary and advisable to safeguard their revenues, and whether the *purpose* of these provisions was to create a bounty or grant upon the export of spirits like those in question is not a matter

into which we may inquire. *Our inquiry is: Is such the effect of this statute and its administration?* [Italic added.]

* * * * * * * * *

* * * In the act of 1897, where the provision here under consideration first appears, this policy of protection was affirmatively stated in the title. While we may not inquire into the purposes but only the *effect* of a foreign law, in determining the meaning of a statute of the United States which it is our function to construe, we may with perfect propriety look to its purpose. Section 5 of the act of 1897 is undoubtedly a part of the national policy as declared in the title of the law "to encourage the industries of the United States." Its purpose was to prevent an unequal competition in our domestic market with the products of other countries, and in determining its application to any state of facts this policy should be kept in mind, for its reenactment by Congress without any change of verbiage indicates the adoption of the same general policy to this extent at least. [Italic added.]

The Court of Customs Appeals also made it clear that the countervailing duty statute was concerned with "results" or "effects" and not purposes or intentions. *Nicholas & Co.* v. *United States*, 7 Ct. Cust. Appls. 97, 106, 107, 108, 109, 113, *aff'd*, 249 U.S. 34 (1919). Of particular interest are the following remarks of the court (7 Ct. Cust. Appls. at 106–107):

> There is nothing obscure, abstruse, mystic, or even ambiguous about this language, which has been, as to the particular words, a part of all our tariff acts from 1897 to and including the present act. Section 5, tariff act of 1897 (30 Stat. L., 151), section 6, tariff act of 1909 (36 Stat. L., 11), paragraph E of section 4, tariff act of 1913 (38 Stat. L., 114). Its plain, explicit, and unequivocal purpose is: Whenever a foreign power or dependency or any political subdivision of a government shall give any aid or advantage to exporters of goods imported into this country therefrom whereby they may be sold for less in competition with our domestic goods, to that extent by this paragraph the duties fixed in the schedule of the act are increased. It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof to any extent directly or indirectly. Wherefore, in obedience to that obvious purpose, the court does not feel at liberty to adopt any constrained or technical definitions of the words "bounty" or "grant" suggested but to vouchsafe the paragraph a meaning, well within its language, that will best effectuate the unquestioned congressional purpose. [Italic in original.]
>
> A great portion of the briefs and record is devoted to an effort to show these payments to exporters of spirits by the United

Kingdom to be an equivalent of certain extra costs attending the excise collections. "In consideration of the loss and hindrance caused by excise regulations."

* * * * * * *

The fact that the payment made by the foreign government was estimated or calculated upon a certain basis or in consideration of extra burdens imposed by domestic excise laws, or *for any other reason of domestic government or policy commending itself to the wisdom of Parliament*, is not controlling in our courts. The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less. * * * [Italic added.]

* * * If it be true that the excise system delineated intentionally or accidentally results in "an advantage to exporters of spirits to this country from the United Kingdom of Great Britain, which directly or indirectly is borne by the public treasury," or affords "a premium in like manner given or paid to encourage any branch of industry or manufactures," likewise exporting, such falls within this paragraph. *Downs* v. *United States* (187 U.S., 496, 502). And, it matters not, nor is it made by Congress an exception thereto, that it is an incidental, indirect, or *unintended* result of the British Government's endeavoring to in part repay or compensate its manufacturers and distillers for a burdensome excise system. The courts are concerned with results and not intentions. [Italic in original.]

The following additional comments by the court in *Nicholas* are also pertinent (7 Ct. Cust. Appls. at 113–114):

> Whatever may have been the purpose or consideration of the payment made upon exportation of these spirits, the incontrovertible fact is present that it necessarily encouraged their exportation and enabled the exporter to sell them at a proportionately less price in competition with the goods of this country. It is a payment directly to the exporter for and upon exportation and the entry of said goods in our body commerce. The doctrine of the case, therefore, may be paraphrased from the language of the Supreme Court in *Allen* v. *Smith* [173 U.S. 389, 402 (1899)], * * *:
>
> Whether allowed in consideration of services rendered or to be rendered, or with the object of a public interest to be obtained, production or manufacture to be stimulated, or a moral obligation to be recognized, it is a bounty.

The Supreme Court in *Nicholas* similarly concluded that notwithstanding that such allowances may be intended merely as compensation for distillers for costs due to British excise regulations and are not confined to cases of exportation, they are, as applied to exports, governmental payments—namely "grants"—made only upon exportation, which, by lessening the burden of British taxation, enable the spirits to be sold more cheaply here than at home—the situation against which the countervailing duty statute was intended to provide.

Nicholas & Co. v. *United States*, 249 U.S. 34 (1919). The Court stated (*id.* at 39):

> * * * The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or mechandise" a countervailing duty is required by Paragraph E.
>
> There can be, therefore, but one inquiry: Was something—bounty or grant—paid or bestowed upon the exportation of spirits? * * *

Following the extremely broad reading given to the countervailing duty law by the Supreme Court in *Nicholas* and *Downs*, Congress undertook, in 1922, to broaden the statute even further by providing for the imposition of countervailing duties against imported merchandise upon which there had been conferred bounties or grants upon "manufacture" or "production." The line drawn between bounties or grants upon export and bounties or grants upon production, described by the Supreme Court in *Downs*, was removed, and all such bounties or grants were covered by the Act. As noted previously, the text of the 1922 statute was reenacted without substantial change in 1930[3] (sec. 303 of the Tariff Act of 1930, 46 Stat. 687), and in 1975 (sec. 331(a) of the Trade Act of 1974, 88 Stat. 2049).[4]

Against the plain language of the statute and the comprehensive judicial discussions of the predecessor provisions involving export bounties, we turn to the Italian programs in question. Unquestionably, the "effect" of these programs has been to reduce SIV's cost of producing float glass. And whether the reduction in cost is occasioned by direct cash payments, or by an act of government reducing labor cost, capital cost, or the cost of any other factor of production is of no consequence. For if a benefit or advantage is received in connection with the production of merchandise, that benefit or advantage is a bounty or grant on production. And to the extent that such bountied merchandise is exported to the United States, it comes squarely within our countervailing duty law—section 303.

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[3] The principal change in the 1930 Act was the conferral on the Secretary of the Treasury of the power to "estimate" the net bounty or grant found to have been paid or bestowed.

[4] While the Trade Act made numerous changes in the countervailing duty law—e.g., extending its coverage to duty-free merchandise, imposing time limits on the Secretary of the Treasury by which to take action, providing for judicial review by American manufacturers—the portion of sec. 303 of the Tariff Act relevant here was left virtually intact.

The Secretary of the Treasury's Reasons for Issuing a Negative Countervailing Duty Determination

As set forth above, the Secretary of the Treasury refused to issue a countervailing duty determination for the following stated reasons (42 F.R. 13016–17, Mar. 8, 1977, T.D. 77–77):

> Information has now been received with respect to SIV which permits a more complete analysis of the alleged bounties and grants. Under various regional development programs administered by the Government of Italy, it now appears that an investment grant, preferential financing and a reduction in the required contribution to the state welfare organization have been given to SIV. No special tax reductions have been utilized by SIV. *The Italian Government has advised the Treasury Department that the benefits received by SIV have the effect of offsetting disadvantages which would discourage SIV from moving to and expanding in less prosperous regions. Inasmuch as SIV sells a preponderance of its production in the European community—more than 97 percent in 1976—the level of its exports outside the European Community is a small percentage of its production, and the amount of assistance provided by the government programs to SIV totaled less than three percent of the value of float glass it produced, those benefits are not regarded as bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).* [Italic added.]

The foregoing explanation was enlarged by defendant in response to plaintiffs' interrogatory No. 23.[5] In its response, defendant stated:

> On May 31, 1974, in accordance with 19 CFR 16.24(b) (1974), a petition was submitted to the Treasury Department alleging that bounties or grants had been paid or bestowed, within the contemplation of 19 U.S.C. 1303, on float glass manufactured or produced in Italy. See 40 F.R. 2718 (1975). Accordingly, it became necessary for the Secretary of the Treasury to conduct an administrative investigation into the allegations, and such an investigation was conducted in accordance with 19 CFR 159.47(c) (1975).
>
> It was ascertained that, in fact, benefits had been given to two producers of float glass in Italy (one being SIV). It was further ascertained that those benefits were afforded pursuant to regional development programs administered by the Government of Italy. The Italian Government advised Treasury that the various regional development programs in question were designed to accomplish certain domestic economic and social

[5] Interrogatory No. 23 asked:

Explain, in detail, why the Secretary of the Treasury or his delegate determined "that no bounty or grant is being, or has been, paid or bestowed directly or indirectly, upon the manufacture, production, or exportation of float glass from Italy produced by Societa Italiana Vetro, S.p.A. within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303) * * *." In your response to this interrogatory, please explain the significance, if any, of the following: (a) the Treasury Department's finding that S.I.V. sells the preponderance of its production in the European Community; (b) the Treasury Department's finding that the amount of assistance provided by the government programs to S.I.V. totaled less than 3 percent of the value of float glass it produced; and (c) the Italian Government's advising the Treasury Department that the subject benefits have the effect of offsetting disadvantages which would discourage S.I.V. from moving to and expanding in less prosperous regions.

goals by offsetting disadvantages which would otherwise discourage industry from moving into and expanding in less prosperous regions. Further, the Italian Government advised that the programs were not designed to favor exports.

It was necessary for Treasury to analyze various relevant factors to determine whether the benefits in question were bounties or grants within the contemplation of 19 U.S.C. 1303. This analysis was designed to ascertain the nature and extent of the consequences of the benefit programs involved, *i.e.*, the economic affects [sic].

In this case, the factors considered by Treasury were:

1) the ad valorem size of the benefits afforded; and
2) the extent to which the product receiving the benefits entered international commerce.

In applying these factors, Treasury considered and ascertained the following (42 F.R. 13016 (1977)):

> The Italian Government has advised the Treasury Department that the benefits received by SIV have the effect of offsetting disadvantages which would discourage SIV from moving to and expanding in less prosperous regions. Inasmuch as SIV sells a preponderance of its production in the European Community—more than 97 percent in 1975—the level of its exports outside the European Community is a small percentage of its production, and the amount of assistance provided by the government programs to SIV totaled less than 3 percent of the value of float glass it produced * * *

The determination made in T.D. 77–7 (42 F.R. 13016) that the benefits described in response to interrogatory 18 did not constitute a bounty or grant within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) was made in view of the above considerations and factual findings.

As explained above, Treasury's findings that (a) SIV sells a preponderance of its production in the European Community, (b) the amount of the assist provided by the Italian Government to SIV produced, [sic] and (c) the subject benefits have the effect of offsetting disadvantages which would discourage SIV from moving to and expanding in less prosperous regions, were all considered in making the determination set forth in T.D. 77–77.[6]

In the absence of a finding that the benefits distorted international trade, it was determined that no bounties or grants had in fact been paid within the scope of 19 U.S.C. 1303, accordingly, in the absence of a bounty or grant, a zero rate was declared.

The Secretary of the Treasury's Reasons for Not Countervailing Lack Validity

For the reasons set out below, none of the reasons set forth by the Secretary as reasons for refusing to issue a countervailing duty deter-

[6] Actually Treasury made no "finding" in T.D. 77-77—or anywhere else—that "the subject benefits have the effect of offsetting disadvantages which would discourage SIV from moving to and expanding in less prosperous regions."

mination has legal validity. In the first place, as is made clear in the *Nicholas* case, the alleged purpose of the Italian Government in conferring grants upon manufacture or production is entirely irrelevant. The question rather is what is the "effect" or "result" of a particular program. In that circumstance, in treating the grants in question as not being grants upon manufacture or production because of certain alleged purposes of the Italian Government for the grants, the Treasury Department acted contrary to the statutory mandate both as written and construed by the courts.

A second factor considered by the Treasury Department—the ad valorem size of the benefits afforded—likewise cannot justify the failure to issue a countervailing determination. On this aspect, it is noted that the Treasury Department determined that the subject benefits had a value of 2.47 percent of the value of float glass produced by SIV which is concededly more than *de minimis*. Yet in the countervailing duty case of *Certain Handbags From the Republic of China*, Treasury acknowledged that a benefit equaling 0.8 percent ad valorem was greater than *de minimis and* therefore countervailable. 42 F.R. 28531 (1977). Further, in the countervailing duty case of *Certain Fasteners from Japan*, Treasury considered benefits of 0.20 percent ad valorem to be "more than *de minimis* and therefore constituting bounties or grants," because that amount was significant when compared to the relevant ad valorem rate of duty equivalents—that is, 0.75 percent ad valorem and 0.25 percent ad valorem. 42 F.R. 23146–47 (1977). When the ad valorem size of the benefit in the present case as determined by the Treasury Department (2.47 percent) is compared to the average ad valorem rate of duty equivalent for the principal TSUSA category (item 543.2770) of float glass imported from Italy in 1975 (6.9 percent),[7] the benefit is even more significant, having a ratio to the duty rate of 35.8 percent (2.47:6.9). It is thus clear that the grants here involved were of such sufficient magnitude that they should have been countervailed.

The third factor stated to have been considered by the Treasury Department is the extent to which the products receiving the benefits entered international commerce. However, the level of exports is not determinative of whether there is a bounty or grant. There is no question but that the ad valorem size of the subject benefits conferred, as determined by the Treasury Department, was the same for every unit of float glass sold by SIV, whether 1 percent or 100 percent of saleable production was exported from Italy. Furthermore, it is clear that had the subject benefits been determined by the Treasury Department to have been countervailable bounties or grants, counter-

[7] See Bureau of the Census, "U.S. Imports of Nonmetallic Minerals and Products (TSUSA Nos. 511.1100-548.0500) for Consumption—IM 146 Schedule 5" (Dec. 1975).

vailing duties in an amount equal to the benefits as determined by Treasury would have been assessed on every unit of float glass, produced by SIV, imported from Italy into the United States, regardless of the percentage of that company's production that was exported to the United States, or to anywhere else. Viewed thusly, the level of exports cannot be determinative of whether there is a bounty or grant. The fact is that every unit of Italian float glass, produced by SIV, imported into the United States has been benefited by an equal amount, as a result of grants (which are more than *de minimis*). And in that situation, the countervailing duty law requires that such benefits on each unit of float glass imported from Italy and produced by SIV be offset.

It is also to be noted that according to the Treasury Department's determination, the level of SIV's "exports *outside* the European Community is a small percentage of its production." 42 F.R. 13016–17 (1977). (Emphasis added.) Similarly in the case of *Float Glass from Belgium* (41 F.R. 1299 (1976)) Treasury used as a criterion the level of exports to countries "outside" the European Community. By contrast, in the cases of *Float Glass from the United Kingdom* (40 F.R. 27499 and 40 F.R. 59227 (1975)) and *Float Glass from West Germany* (41 F.R. 1300 (1976)) the Treasury Department used a different criterion, that is, the level of "total" exports. Thus, notwithstanding that defendant asserted that one of the factors considered by Treasury in reaching its negative determination was "the extent to which the product receiving the benefits entered international commerce," Treasury disregarded Italian float glass produced by SIV which was exported in international commerce to other members of the European Community.

The short of the matter is that neither criterion—level of total exports or level of exports outside the European Community—is any criterion at all—i.e., not one of the factors which Congress deemed relevant in administering the countervailing duty law. However, should that factor which Treasury considered in other cases, and which defendant stated was considered here, be applied, there can be no doubt that as a factual matter the level of exports here—which is admittedly 18.6 percent of production in 1975—is certainly greater than *de minimis*.

In summary, the Treasury Department has failed to justify its refusal to countervail the subject grants bestowed on the manufacture of Italian float glass produced by SIV. Its entire analysis has been vitiated by its consideration of an irrelevancy—namely, the alleged purpose of the Italian regional development programs.

Moreover, the special "factors" which Treasury proceeded to consider, in view of the alleged domestic purpose of the Italian programs are not only irrelevant, they fail to support Treasury's analysis. For

the "ad valorem size of the benefits" is admittedly greater than *de minimis* and the "extent to which the product receiving the benefits entered international commerce" (which is also greater than *de minimis*) in no way affects the value of the benefit conferred on every unit sold. Thus, no valid reason has been given for not countervailing the substantial grants involved herein.

What is more, assuming *arguendo* that these special factors are relevant, the record establishes without contradiction that the Treasury Department has no standards whatever as to the size of the benefits necessary for issuance of a countervailing duty determination or as to what extent the product receiving the benefits must enter international commerce before a countervailing duty determination is made. Instead, as was made clear in oral argument, the Treasury Department implements these factors on a case-by-case basis without benefit of standards, guidelines or yardsticks (tr. 86–89). Were the court to place its stamp of approval on the exercise of such virtually unfettered discretion by the Secretary in derogation of the congressional mandate, there would be a complete abdication of judicial responsibility. The countervailing duty statute does not fluctuate from case to case, encompassing grants upon production in some instances, while for ineffable reasons, excluding such grants in others. On the contrary, the Secretary of the Treasury has been directed to offset the effect of bounties or grants bestowed upon the production of goods which are exported to our shores. Once he determines that such bounties or grants have been bestowed, his inquiry must cease and he has an absolute duty to countervail (or invoke the temporary waiver authority under 19 U.S.C. 1303(d) if such authority is in effect).

The Legislative History and the Contemporaneous and Consistent Interpretation of the Countervailing Duty Statute by the Treasury Department Show That Congress Did Not Intend to Limit Countervailable Bounties or Grants to Benefits Which Promote Exports

Defendant contends that the countervailing duty law was intended to reach only those bounties or grants which distort trade, that is, promote exports. Its argument is based on its perception of the legislative history, case law, and the Secretary's "present" interpretation which, it says, is entitled to great weight. However, for the reasons set out below, the argument is without merit.

As previously discussed, it was not until 1922 that the countervailing duty law provided for bounties or grants bestowed upon manufacture or production. Thus defendant's extensive comments in the history of the Tariff Acts of 1890, 1894, and 1897—all of which were restricted to bounties or grants on exportation—are irrelevant

On the other hand, the Tariff Act of 1922 was not restricted to export bounties. This is evident from the statutory language: "That whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant *upon the manufacture or production or export* * * *." 42 Stat. 935 [*italic added*]. In introducing the amendatory language on the House floor, Congressman Hawley, floor manager of the bill, stated (61 Cong. Rec. 4132 (1921)):

> Mr. Chairman, this amendment simply affects the export from foreign countries of commodities made under a bounty, so that whether they are made for use in that country nominally and then exported, or made for purposes of export, the conditions will apply to them the same in both cases.
>
> * * * * * * *
>
> This provision printed in the act, I think, is practically the current law. But there have been, for instance, jams and jellies manufactured in Australia and other parts of the Southern Hemisphere, where a bounty has been given on the manufacture, as if for consumption in that country, and then afterwards the products were exported. Now, if there is a bounty given for goods manufactured for export, then the terms of this paragraph apply. *These amendments were drafted by the Customs Division of the Treasury Department, so that when the goods are manufactured for export or manufactured for home consumption and then exported, the regulations in this paragraph shall apply.* [Italic added]

Congressman Hawley's remark thus made clear that the 1922 amendment providing for bounties or grants upon manufacture or production was intended to reach goods whether manufactured for export or manufactured for home consumption and then exported. In other words, it is apparent that Congress wished to countervail products imported into the United States which received bounties or grants upon their manufacture or production, regardless of the intended destination of the products at the time of their manufacture or production. Indeed, the Secretary of the Treasury so interpreted the statute. See T.D. 39722 (1923) and T.D. 40001 (1924), involving "Australian bounty on manufacture of fencing wire, galvanized sheets, traction engines and wire netting." It should be noted that on several occasions while T.D. 40001 was in force, Treasury became aware of the "absence or imports" of products embraced by T.D. 40001, and further was informed by letter dated December 4, 1937, from the Assistant Secretary of State to the Secretary of the Treasury of the following:

> *These bounties* on wire netting and tractors *are for the object of encouraging production in Australia for the domestic market* without recourse to the imposition of protective tariff duties against com-

petitive imported articles and a consequential raising of prices to agriculturalists. *There is no question of encouraging production for export* and at the present time tractors to the value of £750,000 are being imported from the United States. [Italic added.]

Notwithstanding these considerations, Treasury issued a further amendatory countervailing duty order in 1932 to take into account the increased Australian bounty (T.D. 45384 (1932)), and did not revoke the countervailing duty order until 1949 (T.D. 52350 (1949)), at which time it determined, based on information from the Department of State, that no bounties or grants were being paid or bestowed. [8]

Relevant also are two countervailing duty orders covering Canadian cheese, T.D. 50093 (1940) and T.D. 53182 (1953). With respect to these orders, in a memorandum to the files, dated May 28, 1964, former Deputy Assistant Secretary of the Treasury Hendrick reported about a meeting he attended at the Department of Agriculture at which he stated, among other things:

> * * * [O]ur General Counsel's office was working on a theory that a payment in respect of a particular product made by a government for a purpose other than stimulating exports to the United States could be considered outside the scope of the countervailing duty law provided that there was no substantial increase in exports to the United States attributable to the payment. I noted that this theory appeared inconsistent with the 1940 order relating to Canadian cheddar cheese and the similar 1953 order relating to Canadian blue vein cheese. * * *

It is important to add that these two countervailing duty orders—T.D. 50093 and T.D. 53182—were issued without regard to any "trade effects" and notwithstanding that the production bounties involved therein were not export-inducing. Indeed, in response to a letter dated August 16, 1939, from an importer—the National Biscuit Co.—stating that the purpose of the Canadian payments countervailed in T.D. 50093 was not for the purpose of subsidizing exports but to encourage the "production" of a better grade of cheese, Assistant Deputy Commissioner of Customs Griffith replied by letter dated August 26, 1939, in which, among other things, he emphasized that the countervailing duty statute reached bounties or grants upon "production"—not just exports. Thus in his letter Mr. Griffith stated in part:

> * * * Enclosed for your information is a reprint of section 303 of the Tariff Act of 1930 from which it will be observed that when-

[8] Defendant argues that T.D. 39722 and T.D. 40001 do not support the view that the countervailing duty statute was intended to reach goods manufactured for home consumption and then exported on the basis that the Australian statute in question provided in part that:

> The Governor-General may, subject to this Act, authorize the *payment* out of the Consolidated Revenue Fund, *which is hereby appropriated for the purpose of bounty*, * * *. [Italic added.]

The short answer to this argument is that the Australian statute is no different in substance from the Italian programs which permit the comeral of grants. For whether the benefit is termed a bounty or a grant, it is covered by the countervailing duty law.

> ever a bounty or grant is paid or bestowed, directly or indirectly, upon the manufacture or *production* or export of any article or merchandise which is dutiable under the provisions of the tariff act, there shall be levied and paid upon such article or merchandise, when imported into the United States, an additional duty equal to the net amount of such bounty or grant. [Italic in original.] * * *

Further with respect to T.D. 53182, the American Embassy in Canada advised the Department of State in 1952 that the cheese in question was produced solely by Benedict Fathers in a monastery and that total production was consumed in Canada. But notwithstanding the fact that the government recognized in 1952 and again in 1964 (at the time of Deputy Assistant Secretary Hendrick's memorandum) that imports of cheese subject to the two countervailing duty orders (T.D. 50093 and T.D. 53182) were minimal, it was not until after Treasury had been informed in 1968 of the termination of the Canadian payments to cheese producers that Treasury discontinued the countervailing duty orders in question. T.D. 68–147 (1968).[9]

The Waiver Authority Provided by the Trade Act of 1974

Additionally, defendant argues that the waiver authority (19 U.S.C. 1303(d)(2)) added by the Trade Act of 1974, 88 Stat. 1978 (1975), demonstrates that Congress intended the countervailing duty statute to reach only those bounties or grants that have an adverse effect on international trade. The argument is completely untenable.

19 U.S.C. 1303(d) reads as follows:

> *Temporary provision while negotiations are in progress*
>
> (d)(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.
>
> (2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the 4-year period beginning on January 3, 1975, that—
>
> (A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty

[9] While conceding that the benefits under the Italian regional development programs here involved ar "grants" within the dictionary definition, defendant seemingly argues that grants under regional development programs occupy a special status under the countervailing duty statute. But this is not apparent from the "affirmative" countervailing duty order that was issued in the case of *Countervailing Duties—X-Radial Steel-Belted Tires from Canada*, T.D. 73-10 (1973) which involved grants to the Michelin Tire Corp. under a Canadian regional development program. The benefits extended to Michelin under the regional development program consisted of: (1) Public assistance grants to offset capital expenditure costs for constructing industrial facilities in Nova Scotia, which grants were not conditioned upon the exportation of products; (2) a six percent loan which was below the interest rate prevailing at the time; and (3) lower property taxes than other property owners. See *Michelin Tire Corporation* v. *United States*, Customs Court No. 75-9-02467. See also, e.g., *Certain Fish From Canada*, 43 F.R. 25996 (June 16, 1978).

or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such 4-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.[10]

Examination of these statutory provisions makes it crystal clear that section 1303(d)(2) does not specify what is or what is not a bounty or grant. On the contrary, it identifies the conditions under which the Secretary of the Treasury may postpone the assessment of countervailing duties (until Jan. 3, 1979) in order to facilitate the negotiation of an international agreement. See H. Rept. No. 93–571, 93d Cong., 1st sess. 75–76 (1973); staff of Senate Committee on Finance, "Summary and Analysis of H.R. 10710—the Trade Reform Act of 1973," 93d Cong., 2d sess. 50–51 (1974); S. Rept. No. 93–1298, 93d Cong. 2d sess. 183–188 (1974). In short, Congress recognized that countervailable bounties or grants may "not" have an "adverse effect", and Congress authorized the Secretary of the Treasury to postpone

[10] 19 U.S.C. 1303(e) authorizes either House of the Congress to veto a determination of the Secretary under 1303(d)(2). Specifically, 19 U.S.C. 1303(e) provides:

Reports to Congress

(e)(1) Whenever the Secretary makes a determination under subsection (d)(2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in sec. 2192 of this title, then such determination under subsection (d)(2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

the assessment of duties to offset such bounties or grants—provided that the conditions specified in section 1303(d)(2) (B) and (C) were also met. Thus, Senator Long, Chairman of the Finance Committee, explained the purpose of the suspension or waiver authority as follows (124 Cong. Rec., S18551 (daily ed., Oct. 12, 1978)):

> In the Trade Act of 1974, Congress directed the President to seek new international rules on subsidy and countervailing duty practices in the multilateral trade negotiations. Our law does not require any finding that subsidized imports are injuring a domestic industry before a countervailing duty is imposed. The general agreement on tariffs and trade requires such an injury finding. Although we are exempt from that GATT requirement under a grandfather clause, our trading partners consider our law to be a violation of the "Spirit" of the GATT. To permit the President to avoid confrontations over the U.S. countervailing duty law while a subsidy code was being negotiated, Congress permitted countervailing duties to be waived; that is, not collected even though a subsidy exists, until January 3, 1979, under certain conditions.

Actually, pursuant to the authority provided by section 1303(d)(2) examinations into trade effects of bounties or grants have been made frequently by the Secretary of the Treasury for the purpose of determining whether to "waive" or "suspend" the imposition of countervailing duties on products upon which countervailable bounties or grants were found to have been bestowed. Thus, in numerous cases, the Secretary of the Treasury waived the imposition of countervailing duties upon receiving assurances from exporters that a bounty-fed product would not be marketed aggressively in the United States so as to cause sales quantities to exceed historic marketing levels. *Butter Cookies From Denmark*, 43 F.R. 955 (Jan. 5, 1978); *Cheese From Sweden*, 41 F.R. 27032 (July 1, 1976); *Cheese From Finland*, 41 F.R. 24703 (June 18, 1976); *Cheese, Other Than Jarlsberg, From Norway*, 41 F.R. 21767 (May 28, 1976); *Cheese From Switzerland*, 41 F.R. 1468 (Jan. 8, 1976); *Cheese From Austria*, 41 F.R. 1275 (Jan. 7, 1976); *Canned Hams and Shoulders From France, The United Kingdom, West Germany, Luxembourg, Ireland, The Netherlands, Denmark, Italy, and Belgium*, 41 F.R. 55639 (Dec. 1, 1975). Further, in the *Canned Hams* case, the Treasury Department conditioned the waiver on "the general economic situation of the swine industry in the United States which will be appraised from time to time in order to determine whether remaining restitution payments on EC canned hams and shoulders are having an adverse effect on the industry." With respect to assessing the state of the industry, the Treasury stated that the factors to be taken into account would be "(a) import penetration by the EC product, including share of U.S. market; (b) trends in U.S. con-

sumption; (c) changes in profitability of the U.S. hog industry; (d) the relationship of the price of hogs to the price of corn in the U.S. commodity markets."

In brief, the authority to waive based on consideration of the impact on trade of a bounty or grant was not intended to be authority to deem a bounty or grant non-countervailable. Indeed, the Senate-House conferees on the 1974 Trade Act stated expressly that the waiver provision should not be construed as the intent of Congress that an injury concept be injected into countervailing duty cases. H. Rept. No. 93–1644, 93d Cong., 2d sess. 45 (1974).

As previously noted, the 4-year temporary waiver authority expired on January 3, 1979. Therefore, since retroactive legislation has not as yet been enacted, numerous products entered after January 3, 1979, are subject to countervailing duty assessment, notwithstanding that the Secretary of the Treasury has determined that "adequate steps have been taken to reduce substantially or eliminate * * * the adverse effect of a bounty or grant which he has determined is being paid or bestowed * * *." 19 U.S.C. 1303(d)(2)(A). Thus, on the eve of the expiration of the waiver authority, the Treasury Department published in the Federal Register an order that all dutiable merchandise which had previously been the subject of a countervailing duty waiver (including the aforementioned butter cookies, cheeses, and canned hams and shoulders), and which was entered or withdrawn from warehouse for consumption on or after January 3, 1979, was to be subject to the payment of countervailing duties. 44 F.R. 141–142 (Jan. 2, 1979). More particularly, this order stated (id. at 142):

> * * * [E]ffective on January 3, 1979, and until further notice, * * * dutiable merchandise (which was subject to a countervailing duty waiver), imported directly or indirectly from the country where manufactured or produced, which benefits from bounties or grants and which is entered, or withdrawn from warehouse, for consumption on or after January 3, 1979, shall be subject, in addition to any other duties determined or estimated to be due, to payment of countervailing duties. Any merchandise subject to the terms of this order shall be deemed to have benefitted from a bounty or grant if such bounty or grant has been or will be credited or bestowed, directly or indirectly, upon the manufacture, production or exportation of such merchandise. [Italic added.]

In summary, it is a patent misreading of the law to argue that the criteria for waiver or postponement are also the criteria for determining whether a bounty or grant has been conferred.

The Congressional Intent in the Trade Act of 1974 to Seek International Agreements

Defendant insists that its agrument with respect to the waiver authority in the Trade Act of 1974 is buttressed by yet another clause,

that is, 19 U.S.C. 1303(d)(1) which, as previously quoted, states that "[i]t is the sense of Congress that the President * * * seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other *export incentives*) and the application of countervailing duties." [Italic added.] According to the defendant, here again Congress once again indicated its interest in export incentives and not domestic subsidies which do not have the effect of distorting trade.

But this argument, too, is devoid of merit. For section 1303(d)(1) does "not" represent the Congressional notion of what the present countervailing statute was intended to reach; rather it describes a trade negotiation "objective."

This is made even more clear by the Senate Finance Committee report on the "Trade Reform Act of 1974" (H.R. 10710), S. Rept. No. 93–1298, 93d Cong., 2d sess. 183 (1974). The entire report is written and arranged in such a manner as to reveal that the Senate Finance Committee, by its recommended amendments to the countervailing duty law, sought to accomplish two objectives: One, the vigorous enforcement of the law, as written, and two, the negotiation of an international agreement.

The report begins with three introductory paragraphs. The first paragraph discusses the need for tightening the law as it existed. The second paragraph reads as follows (S. Rept. No. 93–1298, *supra*, at 183):

> The Committee recognizes that the issues involved in applying the countervailing duty law are complex, and that, internationally, there is the lack of any satisfactory agreement on what constitutes a fair, as opposed to an "unfair," subsidy. In the long run, U.S. interests will be best served by an international agreement to eliminate subsidies which distort world trade patterns and discriminate against U.S. sales both at home and abroad. Central to the forthcoming multilateral negotiations should be the establishment of acceptable international rules governing the use of subsidies. This is particularly important because of the strong possibility that oil importing nations will be tempted to subsidize their manufactured goods exports in order to pay for their "oil deficits."[11]

The third paragraph of the report discusses the need for flexibility in applying the tightened law while negotiations of an international agreement were in progress. Id. at 183. These three paragraphs were then followed by several numbered sections, the first six of which

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[11] In *ASG Industries, et al.* v. *United States*, 82 Cust. Ct. ——, C.D. 4782 (Jan. 5, 1979), *appeal pending*, Judge Ford of this court relied in part on this paragraph of the Senate Finance Committee report in holding that bounties or grants on float glass produced in West Germany were not countervailable on the ground that they did not tend to distort international trade. See slip op. at 14.

described ways in which the committee amendments were intended to improve the enforcement of the law. Id. at 183–185.

In the seventh section, the committee elucidated on its dual objective, as follows (Id. at 185):

> The provisions outlined above are designed to tighten the administration of the countervailing duty law. As noted, a second concern of the Committee is the need to establish internationally acceptable rules and procedures governing the use of subsidies and imposition of countervailing duties.

The committee then proceeded to amplify this "second concern" and stated that "the interests of the United States will be best served by international agreement permanently eliminating the use of governmental subsidies which distort trade patterns." Id. at 186. The obvious congressional concern over trade distortive subsidies is the deleterious effect that such subsidies would have on domestic producers and workers. See Id. at 183. However, the committee and ultimately the Congress made it clear that "until an international agreement was reached," the countervailing duty law "was to be enforced as written" and that bounties or grants (bestowed by governments or private citizens) would be countervailable whether or not they caused "adverse effects," although the reduction or elimination of such adverse effects could be cause, under certain circumstances, for the suspension of assessment of countervailing duties.

The Cases Do Not Support Defendant's Position That the Countervailing Duty Statute Was Intended to Reach Only Those Actions Which Have the Effect of Distorting International Trade

Defendant relies on *Downs* v. *United States*, *supra*, 187 U.S. 496 *Nicholas & Co.* v. *United States*, *supra*, 249 U.S. 34; and *United States* v. *Zenith Radio Corp.*, 64 CCPA 130, C.A.D. 1195, 562 F. 2d 1209 (1977), *aff'd* 437 U.S. 443 (1978), for the proposition that the countervailing duty statute was intended to reach "only" those actions which have the effect of distorting international trade. However, these cases do not support that proposition. Not only were *Downs* and *Nicholas* decided at a time when the countervailing duty law reached bounties or grants upon exportation only, but these cases made clear that the statute was extremely broad, was intended to cover all benefits conferred on exportation, and was not conditioned on an examination as to whether a particular government program did in fact lead to increased export performance. The Board of General Appraisers in *Downs* also had made clear its understanding that the term "bounty or grant" covered any governmentally-conferred benefit or favor. *Downs* v. *United States*, *supra*, 4 T.D. at 406–409. What is more, the record in *Downs* showed that exports of Russian sugar "decreased" since the scheme in issue. See dissenting opinion of General Appraiser Tichenor,

4 T.D. at 419. But this was of no consequence in *Downs*. *Cf. ASG Industries, et al.* v. *United States, supra*, C.D. 4782, slip op. at 18.

In *Nicholas*, the Supreme Court (and the lower courts) also construed the law very broadly, 249 U.S. at 39, expressing the understanding that the purpose of the then-existing countervailing duty statute was the prevention of an unequal competition in our domestic market with products of other countries which give to their manufacturers some special advantage.

Defendant's reliance on *Zenith* is also misplaced. There the Court of Customs and Patent Appeals and the Supreme Court held that the nonexcessive remission of an indirect tax upon exportation was not a bounty or grant. The reasons for the holding were: (1) The long-continued, uniform interpretation of the statute by the Secretary of the Treasury which interpretation was entitled to great weight; (2) the legislative history of the statute which suggested that the term "bounty" was not intended to encompass the nonexcessive remission of an indirect tax; and (3) the Secretary's contemporaneous and long-standing interpretation was considered reasonable in light of the statutory purpose of the countervailing duty act. Neither the Court of Customs and Patent Appeals nor the Supreme Court in *Zenith* even remotely suggested that the countervailing duty statute reaches only those alleged bounties or grants which have the effect of distorting international trade.

Despite these considerations, defendant insists that the Secretary of the Treasury's "present" interpretation of the countervailing duty law as reaching only those actions which have the effect of distorting international trade is entitled to great weight. Citing *Zuber* v. *Allen*, 396 U.S. 168, 192–193 (1969), defendant has asserted that the "principle" of deference to administrative interpretation is especially applicable here since the 1922 amendment, which added the terms "manufacture or production" to the statute, was enacted pursuant to a Treasury Department request. However, as previously discussed, in an interpretation made contemporaneously with the enactment of the 1922 amendment, the Secretary of the Treasury did not require an inquiry into the trade effects of a bounty or grant upon manufacture or production. See T.D. 39722 (1923) and T.D. 40001 (1924), *supra*. See also T.D. 50093 (1940) and T.D. 53182 (1953), *supra*. Moreover, as noted in *Zuber* v. *Allen*, 396 U.S. at 192, administrative construction "is only one input in the international equation." The courts will not defer to an administrative interpretation of a statute when it is inconsistent with the statutory language or the Congressional purpose and intent. *Securities and Exchange Commission* v. *Sloan*, —— U.S. ——, 46 L.W. 4426 (May 15, 1978); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86,

94–95 (1973); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, 25, C.D. 4708, 435 F. Supp. 389, 393 (1977).

Here the Secretary's interpretation cannot be harmonized with the statutory language or Congressional purpose. The statute expressly requires a countervailing duty "[w]henever any country * * * shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production * * *." The purpose of the statute is, indisputably, to protect domestic producers from import competition which has benefited from bounties or grants. The grants in issue are indisputably bestowed upon manufacture or production and enable foreign product to be sold for less than it otherwise could be in competition with domestic product in the United States.

Notwithstanding the foregoing, defendant argues that the Secretary's present interpretation is reasonable and that a failure to inquire into the international trade effects of foreign government programs would result in an intrusion into the domestic affairs of foreign countries, and the imposition of an economic penalty on foreign domestic programs.[12] However, in view of the statutory language, the legislative history, the prior administrative constructions, and the overall purpose of the statute, the Secretary of the Treasury's present interpretation can in no wise be deemed reasonable.

Moreover, the Secretary's "present" interpretation is directly contrary to his order of January 2, 1979, 44 F.R. 141, *supra* pages 49-50. For in that order (as previously discussed), the Secretary required the imposition of countervailing duties on dutiable merchandise on which bounties or grants had been paid even though the Secretary had previously determined pursuant to his waiver authority that such bounties or grants lacked an adverse effect. Considered in this light, the inescapable conclusion is that the Secretary's "present" interpretation—that Congress intended the countervailing duty statute to reach only those bounties or grants that have an adverse effect—is simply an *ipse dixit* deference to which would be judicial abdication.

The Hammond Lead Case

Defendant further asserts that the Secretary of the Treasury must exercise judgment in interpreting the countervailing duty statute.

[12] Contrary to defendant's argument, an affirmative countervailing duty order does not constitute an indictment of another nation's policies—domestic or foreign; it does not constitute an attempt by the United States "to dictate domestic policy to hundreds of sovereign nations"; it does not result in the imposition of an economic penalty. See S. Rept. No. 92-1221, 92d Cong., 2d sess. 8 (1972). Rather, it represents merely an effort to offset any advantage conferred by foreign government programs upon the manufacture, production, or export of goods, imported into this Nation. If a small quantity of Italian float glass, produced by SIV is imported into the United States, only a small amount of countervailing duty would be collected—to neutralize the benefits received vis-a-vis the U.S. competitors of SIV. A failure to impose countervailing duties would be to frustrate the congressional purpose of preventing "an unequal competition in our domestic market with the products of other countries * * *." *Nicholas & Co.* v. *United States*, *supra*, 29 T.D. at 62.

Continuing with this argument, defendant insists that Congress has given the Secretary of the Treasury broad discretion in interpreting the statutory terms "bounty" and "grant." In support of this position, defendant relies on *United States* v. *Hammond Lead Products*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. den.*, 404 U.S. 1005 (1971) and on the following observations by the Court of Customs and Patent Appeals in *United States* v. *Zenith Radio Corp.*, 64 CCPA 130, C.A.D. 1195, 562 F. 2d 1209 (1977), the *holding* in which was affirmed by the Supreme Court, 437 U.S. 443 (1978):

> Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the exi stence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty," "grant," or "net amount," in the statute or anywhere else, for almost 80 years. [64 CCPA at 138.]
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> * * * * * * *
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> * * * Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or gra nt and what shall not, or the calculations to be followed in deter mining net amount. As this court said in *Hammond Lead*, supra note 11: "In the assessment of a countervailing duty, the deter mination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres," 58 CCPA at 137, 440 F. 2d at 1030, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as "countervailing" duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage. Presumably enacting and reenacting section 303 in this broad light, illuminative of the statute's role in the world, Congress in its wisdom has simply refrained from calling all the countervailing duty plays in advance. [64 CCPA at 140.]

In *ASG Industries, et al.* v. *United States*, C.D. 4782, *supra*, Judge Ford relied heavily on *Hammond Lead* and the above-quoted language in *Zenith* in holding that bounties or grants on float glass produced in West Germany were not countervailable on the ground that they did not tend to distort international trade. Slip op. at 11–14. And in *ASG Industries, et al.* v. *United States*, 82 Cust. Ct. 61, C.D. 4788 (Feb. 6, 1979), *appeal pending*, Judge Landis of this court also placed heavy reliance on *Hammond Lead* and *Zenith* (slip op. at 8–12) in holding that benefits extended to a British float glass producer under a Great Britain regional development program did not constitute bounties or grants on the basis that the Secretary of the Treasury had wide discretion in determining what acts of foreign governments confer

bounties or grants and that in the instant case the Secretary's interpretation was sufficiently reasonable.

Because of the significance thus afforded *Hammond Lead* in the foregoing observations in *Zenith* and in the above *ASG* cases, a full understanding of the *Hammond Lead* case and the congressional action resulting therefrom becomes important.

In that case, Hammond Lead, a domestic manufacturer of litharge—a lead oxide—filed a complaint with the Commissioner of Customs pursuant to section 516(b) of the Tariff Act of 1930 (19 U.S.C. 1516(b)) to the effect that litharge imported from Mexico was the recipient of a bounty or grant from the Mexican Government, thus requiring the imposition of countervailing duties under section 303. The Commissioner, acting for the Secretary of the Treasury, declined to impose such duties, whereupon Hammond Lead brought an action in this court. The Government and party-in-interest moved to dismiss on the ground that this court lacked jurisdiction of the subject matter of an American manufacturer's protest which complained that the Secretary failed to invoke a countervailing duty. Motions to dismiss were denied by this court in a rather extensive opinion. *Hammond Lead Products* v. *United States*, 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533 (1968). Trial on the merits followed. Thereafter, this court sustained Hammond Lead's protest on the theory that there was a bounty or grant on export of the litharge from Mexico and ordered the imposition of countervailing duties. *Hammond Lead Products* v. *United States*, 63 Cust. Ct. 316, C.D. 3915 (1969).

On appeal, the Court of Customs and Patent Appeals, by a 3 to 2 vote, reversed and held that this court lacked jurisdiction. *United States* v. *Hammond Lead Products*, *supra*, 58 CCPA 129. The court concluded (Id. at 137):

> All considered, it appears that countervailing duty is a *penal exaction* that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516(b) proceeding, and is not a "duty" within the meaning of that section.[13] [Italic added.]
>
> Further, we note that Article III courts should abstain if possible from passing on controversies not essentially judicial in nature. *Cf.*, *Glidden* v. *Zdanok*, 370 U.S. 530 (1962). In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres. In *Glidden* v. *Zdanok*, *supra*, the review of Tariff Commission determinations under the Tariff Act of 1930, section 337, 19 U.S.C. 1337, was held nonjudicial business. Therefore, if doubtful, the question of jurisdiction here should be resolved against jurisdiction.

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[13] The statement that a countervailing duty was "penal" was repudiated in a 1972 Senate Finance Committee report discussed *infra*.

The court then continued (Id. at 138–140):

> The Congress is, of course, well aware of these problems, and it would seem it elects to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries which have taken reasonable action, action our own government takes or counsels. Countervailing duties are strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded by the court as unethical. In what has been hitherto the regular practice of the Treasury Department making the decision to assess countervailing duties, the decisions, not necessarily partisan political, but political in a broad sense, legislative, or of a policy nature, can be made by an agency that is equipped and staffed to make them. There can be no doubt that the Secretary is under a legal duty to assess countervailing duties if he sees a bounty or grant being paid, but we think he does and must exercise some discretion in defining what acts of foreign governments confer bounties or grants, when the case is doubtful. We think too, that the question whether an indirect bounty or grant is paid does not lend itself to a legal answer without the help of other disciplines. Courts that appeared to deal with the issue as purely legal, hitherto have had the benefit and help of Treasury expertise, since the issue has always come up under section 514, on an importer's protest of a Treasury action. Courts, reviewing the Treasury decision, need not redo the whole thing but could concentrate on the aspects susceptible of judicial resolution.
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> Thus the true congressional intent, with respect to section 303, we believe contemplates some moderate degree of executive discretion in defining what sort of foreign governmental actions constitute indirect bounties or grants. An alleged indirect bounty or grant reasonably not seen as such by the executive is a case outside the contemplation of Congress. Instances of cases outside the scheme and purpose of Congress but within the literal language of Federal statutes, or vice versa, are not uncommon and courts are required to deal with them: *e.g.*, *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *Helvering* v. *Hammel*, 311 U.S. 504, 510–11 (1934); *Select Tire Salvage Co.* v. *United States*, 181 Ct. Cl. 695, 386 F. 2d 1008 (1967). A classic case in this court is *Procter & Gamble Mfg. Co.* v. *United States*, 19 CCPA 415, T.D. 45578 (1932), *cert. denied*, 287 U.S. 629, in which it was held, because the statutory scheme as a whole so required, that whale oil produced on the high seas was "imported from a foreign country."
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> It seems to us to be thus outside the contemplation of Congress, therefore, that anyone should bypass the executive branch in this class of case, by invoking 516(b) procedure as was done here. In the generations of those who wrote sections 303 and 516(b), no one seems to have thought of doing it. It had to wait until those who had any personal contact with these congressional actions had gone to their rewards. We think the fit of 303 and 516(b) is not so close as to show by themselves that in framing either the other was in contemplation, and legislative history

does not help. The dealing with countervailing duties in the General Agreement on Tariffs and Trade, paragraph 4 of article VI, 61 Stat. A 11 (1947) seems to reflect a belief on the part of Treasury in 1947 that it could veto an assessment of countervailing duties if it chose, and Congress has not since enacted anything to contradict that assumption.

Finally, the court made the following concluding observations by way of dictum (Id. at 140–141):

It may be asked, if our interpretation of section 516(b) is correct, does it leave the American Manufacturer entirely remediless even in case of an arbitrary and capricious refusal by Treasury to take appropriate action under the countervailing duty law. It is difficult to answer the question without deciding in dictum cases not before us, but a few observations will be made. The second circuit, in *J. C. Penney Company Inc.* v. *United States*, 439 F. 2d 63 (decided Mar. 1, 1971), has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. A case of an American Manufacturer having no remedy at all in the Customs Court is greatly different. It is anomalous for anyone but the Government and the taxpayer to have a litigable interest in the assessment of a tax. However, the Congress has recognized the strong economic interest of domestic industry in the maintenance of adequate protective duties and has fashioned a special remedy in limited circumstances. It is candidly not co-extensive with the importer's protest in significant respects, for example, in being denied retroactive effect. It has been held to be "the grant of an extraordinary privilege which must be strictly construed against the grantee." *The Cronite Co., Inc.* v. *United States*, 38 Cust. Ct. 76, 83, C.D. 1847, 150 F. Supp. 754 (1957, per Lawrence, J.). The Congress may well have intended the scope of section 516(b) to be all the scope to litigate the domestic industry should be allowed to have. Of course, any customs exaction benefits the domestic industry to the extent it hinders the importer and weakens him financially and as a competitor. The need of the domestic industry for full enforcement of regular duties, however, might have appeared to Congress much greater than in the case of penal or retaliatory exactions. The former may be the basis on which capital is invested and production planned. No one would depend on the continuance of an exaction, the very purpose of which is to end the practice that called it into being. Thus it may be that any decision limiting 516(b) may correspondingly limit the access of a complaining domestic industry to any kind of court relief. On the other hand, the modern tendency to fashion a remedy for any injury is a strong one, and it could be the regular courts would take jurisdiction in cases outside section 516(b), where the domestic industry showed clear illegality and substantial injury. Such a proceeding would not be a *de novo* determination like the one the court below made here, but would, we think, be more in the nature of a review of the

administrative decision, which would be overturned only if found arbitrary, capricious, or not founded on substantial evidence. A court considering the fashioning of such relief would have to consider its need in light of judicial remedies, and also such extra-judicial ones as the domestic industry might have, in resort to the Congress or to the Tariff Commission. We do not undertake to predict the answer.

The Congressional Action in Response to Hammond Lead

Soon after *Hammond Lead*, Congress took action to overcome the decision. Congress was disturbed not only because of the denial to the American manufacturer of his day in court, but because of the judicial construction that Congress had conferred a broad discretion on the Secretary, when in fact the countervailing duty law had been written in mandatory terms. On June 29, 1972, and September 7, 1972, bills were introduced in the House and Senate respectively to provide for judicial review by American manufacturers of negative countervailing duty determinations. H.R. 15794, 92d Cong., 2d sess., 118 Cong. Rec. 23484 (1972); S. 3964, 92d Cong., 2d sess., 118 Cong. Rec. 29695 (1972). In support of the House bill which he introduced, Congressman Fulton made it clear that he wished to overrule *Hammond Lead* and stated (118 Cong. Rec. 23883 (1972)):

> The effect of that case is to emasculate the countervailing duty law which is designed to offset the artificial competitive advantage of imported products over American-made products by virtue of subsidies given in the exporting country. *While the countervailing duty law is mandatory in its terms*, the Hammond Lead decision forecloses effective relief to injured domestic producers where Treasury decides for *policy reasons* not to enforce the law or unreasonably delays enforcement. [Italic added.]

On the Senate side, Senator Fannin also expressed the desire to overrule *Hammond Lead*, and among other things stated (118 Cong. Rec. 29698 (1972)):

> (In view of *Hammond Lead*) we are faced with a situation where an importer has the right to judicial review under the statute but a domestic manufacturer is denied his day in court.
>
> The amendment that is being introduced today would enable our domestic producers to begin using effectively an instrument that we have already on hand (the countervailing duty statute), one designed for the sole purpose of insuring fair competition.

On September 27, 1972, the Senate added to a minor House-passed tariff bill an amendment providing the judicial review sought in the other two bills mentioned. See 118 Cong. Rec. 32413–16 (1972). In reporting out the amended bill, the Senate Finance Committee made the following significant remarks (S. Rept. No. 92–1221, 92d Cong., 2d sess. 8 (1972):

The Committee amendment providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*) holding that judicial review was not available to American producers in countervailing duty cases. The committee is concerned that that decision might adversely affect the ability of American producers to obtain meaningful relief against subsized [sic] import competition under the Countervailing Duty Law (sec. 303 of the Tariff Act) because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.

In addition, importers enjoy the right to judicial review in countervailing duty cases under existing law. The Committee believes that American producers as well as importers should be permitted to have the right to judicial review in countervailing duty cases as a matter of basic equity and fairness, and as a means to *secure administration of the law in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303.* [Italic added.]

The Countervailing Duty Law requires the Secretary of the Treasury to assess an additional duty on imports of dutiable articles with respect to which a bounty or grant has been paid. The additional duty must be equal to the amount of the bounty or grant, thereby neutralizing the artificial advantage afforded the foreign product by virtue of the subsidy. *Consequently, countervailing duties are not, nor were they ever intended to be, penal in nature: they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded foreign merchandise.* [Italic added.[

Although the amendment was accepted by the House-Senate conferees (H. Rept. No. 92–1583, 92d Cong., 2d sess. (1972); S. Rept. 92–1298, 92d Cong., 2d sess. (1972)), the bill was not brought to a vote in the House as an accommodation to the Secretary of the Treasury, with the understanding that the matter would be given attention in the context of trade legislation in the next Congress. See 118 Cong. Rec. 37098 (1972). While the executive branch's trade legislation proposal of April 1973 contained no provision for judicial review of negative countervailing duty determinations, Congress provided one in the Trade Act of 1974.[14]

Finally, not only did Congress set time limits and provide for judicial review over negative determinations, in an effort to eliminate any "policy" options Treasury may have assumed for itself in administering the countervailing duty law, but Congress also explicitly limited the discretion of the Secretary of the Treasury. The trade bill proposed by the executive branch in 1973 contained a provision which would

[14] The House Ways and Means Committee expressed views similar to those that the Senate Finance Committee expressed in S. Rept. No. 92-1221, supra, in 1972. H. Rept. No. 93-571, 93d Cong., 1st sess. 76 (1973). In its 1974 report on the trade bill, the Senate Finance Committee was particularly emphatic in its discussion of the need to assure protection to U.S. producers against bounty-fed foreign competition. See S. Rept. No. 93-1298, 93d Cong., 2d sess. 183 (1974).

have given the Secretary of the Treasury the discretion to refrain from ordering the assessment of countervailing duties if he determined that the imposition of such duties would result or be likely to result in significant detriment to the economic interests of the United States. H.R. 6767, 93d Cong., 1st sess., section 330 (1973). *This proposal was rejected by Congress.* The House of Representatives instead passed a bill which would have authorized the Secretary of the Treasury to suspend the imposition of countervailing duties if he determined that such imposition would be likely to seriously jeopardize the satisfactory completion of contemplated international trade negotiations. H.R. 10710, 93d Cong., 1st sess., section 331 (1973). *However, even this proposed grant of limited discretion was not found acceptable to the Senate, because it failed to protect sufficiently the needs of domestic industry.* See S. Rept. No. 93–1298, 93d Cong., 2d sess. 186 (1974). The Senate replaced the House proposal with a much more limited grant of discretion to postpone countervailing duty assessments. It was the Senate version which became law. See section 303 (d)(2) and (e) of the Tariff Act of 1930, as amended (19 U.S.C. 1303 (d)(2) and (e)). Furthermore, any exercise of the "postponement" authority was subject to immediate review and veto by either House of Congress. See section 303(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1303(e)).

With the enactment of the Trade Act of 1974, Congress required Treasury to reach a final countervailing duty determination within one year of the filing of the petition. 19 U.S.C. 1303(a)(4). By taking this action, Congress wished to prevent the Treasury Department from pursuing past practice "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the *clear and mandatory* nature of the countervailing duty law." S. Rept. No. 93–1298, 93d Cong., 2d sess. 183 (1974).[15] [Italic added.]

In this setting, it is thus clear that Congress intended that, until further amendment and absent the three specified conditions precedent to the invocation of the discretionary authority in 19 U.S.C. 1303(d)(2), the countervailing duty law be enforced on the basis of the "unambiguous" statutory language and the case law construing it. Put otherwise, Congress did "not" intend to give the Secretary of the Treasury a broad grant of discretion in interpreting the statutory terms "bounty" or "grant." Rather, Congress intended precisely the contrary.

Nothing the Supreme Court said in *Zenith* detracts from the foregoing. In *Zenith*, as previously noted, the Court held that the non-

[15] Also in the Trade Act, Congress provided for judicial review of negative countervailing duty determinations in order "to assure effective protection under the countervailing duty laws to American producers." S. Rept. No. 93-1298, *supra*, at 185.

excessive remission of an indirect tax upon exportation was not a bounty or grant. As basis for this holding the Court concluded that the Secretary's interpretation that such remission was not a bounty or grant was a reasonable interpretation in view of the Treasury Department's consistent 80-year old practice, congressional unwillingness to amend the law (i.e., overrule the practice), the legislative history of the 1897 legislation, which in the Court's view indicated congressional understanding that the non-excessive remission of indirect taxes on export was not countervailable, and the absence of any conflict between the Secretary's interpretation and the congressional purpose or statutory language.

In the present case, by contrast, the Secretary's interpretation is not supported by a long-established practice. Rather (as previously discussed) the practice developed by the Treasury Department with the introduction of the relevant statutory language in 1922 excluded any consideration of trade effects. Secondly, there is an absence of legislative history supporting defendant's position; rather the legislative history contravenes it. Thirdly, there is an irreconcilable conflict between the Secretary's interpretation and the congressional purpose. The purpose of the law is to prevent unequal competition in our markets—to prevent foreign goods from competing with domestic goods at a lower price than they would otherwise be sold. Finally, there is an irreconcilable conflict between the Secretary's interpretation and the statutory language.

It is to be added that in *Zenith* the manufacturer-importer argued that the non-excessive remission of an indirect tax had a similar economic effect in inducing exports as remission of a direct tax which concededly was countervailable and that as a consequence remission of the indirect tax was within the scope of the countervailing duty statute. Responding to this argument, the Supreme Court stated (437 U.S. at 458–459):

> Aside from the contention, discussed in part III, *infra*, that the Department's construction is inconsistent with this Court's decisions, petitioner's sole argument is that the Department's position is premised on false economic assumptions that should be rejected by the courts. In particular, petitioner points to "modern" economic theory suggesting that remission of indirect taxes may create an incentive to export in some circumstances, and to recent criticism of the GATT rules as favoring producers in countries that rely more heavily on indirect than on direct taxes.* * * But, even assuming that these arguments are at all relevant in view of the legislative history of the 1897 provision and the long-standing administrative construction of the statute, they do not demonstrate the unreasonableness of the Secretary's current position. Even "modern" economists do not agree on the ultimate economic effect of remitting indirect taxes, and—given the present

state of economic knowledge—it may be difficult, if not impossible, to measure the precise effect in any particular case. See, *e.g.*, Executive Branch GATT Studies, supra, at 13–14, 17; Marks & Malmgren, Negotiating Nontariff Distortions to Trade, 7 L. & Policy in Int'l Bus. 351 (1975). More fundamentally, as the Senate Committee with responsibility in this area recently stated, "the issues involved in applying the countervailing duty law are complex, and * * * internationally, there is [a] lack of any satisfactory agreement on what constitutes a fair, as opposed to an 'unfair,' subsidy." S. Rept. No. 93–1298, p. 183 (1974). In this situation, it is not the task of the judiciary to substitute its views as to fairness and economic effect for those of the Secretary.

What the Court was saying in effect was that since there were economic arguments to be made on both sides as to whether the nonexcessive remission of an indirect tax creates an incentive to export, the Court would not contribute its own economic analysis but rather would defer to the Secretary. But before the Court deferred to the Secretary, it satisfied itself that the Secretary's interpretation of the statute was a reasonable interpretation in view of the Treasury Department's consistent 80-year-old practice, Congressional unwillingness to overrule the practice, the legislative history, and the absence of any conflict between the Secretary's interpretation and the Congressional purpose or statutory language.

Moreover, the above quoted statement of the Supreme Court is entirely irrelevant here. In *Zenith* the Court was concerned with a claimed bounty or grant upon "export" while here we are concerned with a grant upon "production." And in the latter connection, the economic benefits extended SIV by the Italian Government are concededly "grants" within the dictionary meaning of that term and are more than *de minimis*. This being the case, whether or not their economic effect is to distort international trade or to induce exports is immaterial. For, as explained in detail, such a bounty or grant is within the reach of the countervailing duty without regard to its trade effects.

What this all comes down to in the final analysis is that the Secretary of the Treasury's refusal to require the imposition of countervailing duties in the present case not only ignored completely the congressional mandate contained in section 303 of the Tariff Act of 1930, as amended, it rendered meaningless the waiver provisions of the Trade Act of 1974. The point is that once the Secretary found that a bounty or grant lacked an adverse effect, his sole alternative under the statutory scheme was to impose countervailing duties or to issue a waiver pursuant to the authority contained in the 1974 Trade Act—which waiver, of course, was subject to veto by either House of Congress. Failing to make a waiver determination, the Secretary's obligation was clear and unmistakable—to require the assessment of counter-

vailing duties. And, as previously pointed out, this obligation the Secretary himself recognized by his order of January 2, 1979 (the day before the expiration of the waiver authority under the 1974 Trade Act) in which he required the assessment of countervailing duties on a host of bountied importations that had previously been subject to waiver because of their lack of adverse effect. See, *supra*, pages 49–50. The conclusion thus becomes inescapable that to uphold the defendant's position in the present case—that section 303 does "not" reach bounties or grants that do "not" have an adverse effect—would mean that even should Congress extend the waiver authority of the Trade Act of 1974,[16] such enactment would be an empty gesture. For the Secretary could bypass altogether the congressional scrutiny mandated by the waiver provision and refuse to impose countervailing duties (just as he has refused to impose such duties here and in the other *ASG* cases) on the ground that the countervailing duty statute does not cover bounties or grants that do not have an adverse effect on international trade.

Scope of Review

Defendant further argues that the scope of review in this case is limited to the question of whether the Secretary's decision was arbitrary or capricious and that a *de novo* determination on the merits is precluded. Again this argument is without merit. It ignores the fact that every countervailing duty case litigated—just as every tariff classification and valuation case (in modern times)—has been tried de novo either before this court or the Board of General Appraisers. Judicial review of countervailing duty determinations has never been upon an administrative record; there is no "administrative record" in such cases—no evidentiary hearings, no evidentiary findings, no cross-examination of witnesses. If an importer wishes to challenge the assessment of countervailing duties on the ground that no bounty or grant was bestowed, he has the right to adduce evidence and he also has the burden of proof. E.g., *Mueller & Co.* v. *United States*, 28 CCPA 249, 257, C.A.D. 152 (1940); *American Express Company* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd* 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973). See also, e.g., *Michelin Tire Corporation* v. *United States*, 82 Cust. Ct. 308, C.R.D. 79–6 (Feb. 26, 1979), *writs of mandamus and prohibition pending.* Thus in *Mueller*, where an importer challenged the assessment of countervailing duties, the Court of Customs and Patent Appeals stated (28 CCPA at 257):

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[16] It is to be noted that on Mar. 1, 1979, the House approved H.R. 1147 which extended the waiver provision to whichever of certain dates first occurred. See 125 Cong. Rec. H 1018-H 1025 (daily ed., Mar. 1, 1979). On Mar. 28, 1979, the Senate approved the bill. See New York Times, Mar. 29, 1979, p. D12.

> We do not mean to be understood as holding that appellant (importer) had not the right to bring forward any questions of fact relating to the transaction and have them tested by the applicable law, but the burden of showing the facts in detail rested upon it, and it was not incumbent upon the Secretary to go further than he went in this regard.[17]

Furthermore, and quite apart from historical (and statutory) considerations, the Supreme Court has indicated that de novo review is appropriate where there are inadequate factfinding procedures in an adjudicatory proceeding. E.g., *Camp* v. *Pitts*, 411 U.S. 138, 141–142 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Thus, although a countervailing duty investigation "is in the nature of a factfinding activity rather than rulemaking," *American Express Co.* v. *United States*, *supra*, 60 CCPA at 93, and the factfinding procedures are inadequate—secrecy, no hearings on the record, no cross-examination, no evidentiary findings—there is available a full trial *de novo* in this court.

These considerations are particularly applicable to the present case. For example, after a "final" *affirmative* duty order was published in this case on January 7, 1976, with respect to float glass produced by SIV, the Secretary of the Treasury had communications with the Italian Government in the course of which he received from that Government certain representations on which he relied heavily in superseding his once "final" *affirmative* determination with a "final" *negative* determination here in issue. What is significant is that at no time prior to his "final" *negative* decision did the Secretary advise the petitioners (plaintiffs here) that he had obtained this information from the Italian Government so as to enable the petitioners to file any kind of a reply. It is quite true that nothing in the statute required the Secretary to make available to any interested party any of the information he gathered. However, were there any validity to defendant's position that judicial review of the Secretary's decision must be limited to the administrative record and a trial prohibited, elementary principles of fairness would have required the Secretary to afford the petitioners an opportunity to comment or be heard on the Italian Government's representations before making his decision. The fact that the petitioners were denied this opportunity makes it even more apparent that there was no "administrative record" and that the

[17] When the Senate Finance Committee reported out what was to become the Trade Act of 1974, the committee introduced an amendment to sec. 516 of the Tariff Act of 1930 (19 U.S.C. 1516(d)), providing for judicial review over "negative" countervailing duty determinations. See S. Rept. No. 93-1298, 93d Cong., 2d sess. 260-261 (1974). In addition to providing American manufacturers with a tool to enforce the clear, explicit, and mandatory countervailing duty statute, the amended sec. 516 was clearly intended to give American manufacturers the "same right" to judicial review over negative countervailing duty determinations that importers had (and have) over affirmitive countervailing duty determinations. See S. Rept. No. 93-1298, 93d Cong., 2d sess. 260-261 (1974) 183, 185; H. Rept. No. 93-571, 93d Cong. 1st sess. 76 (1973); S. Rept: No. 92-1221, 92d Cong., 1st sess. 8 (1972).

factfinding procedures were entirely inadequate, characterized as they were by secrecy, no hearings, formal or informal, and no evidentiary findings.

I am quite mindful that in *American Express*, the Court of Customs and Patent Appeals affirmed this court's decision "on the basis of which * * * (the Secretary of the Treasury) relied." 60 CCPA at 95. However, this does not mean that the appellate court approved of review upon the administrative record. Rather, the court was simply indicating its agreement with the Secretary's legal reasoning. In fact (as previously indicated) in *American Express* a trial *de novo* was held before this court and stipulations of facts were entered into. See *American Express Company* v. *United States*, *supra*, 67 Cust. Ct. 141. And this without the slightest hint of disapproval by the appellate court.

What is more, in *American Express* the Government itself took the position in its brief before this court (br. p. 46) that "[t]he Secretary is not required to make any administrative record nor to submit one to the Customs Court for review." "Indeed," the Government added, "the Customs Court having *de novo* jurisdiction, such a record would be *irrelevant* before this tribunal." [Italic added.] In a similar vein, the Government argued before the Court of Customs and Patent Appeals in *American Express* (br. pp. 66–67):

> Under the provisions relating to adjudicative actions, 5 U.S.C. 554, no hearing or notice of hearing is necessary unless such action is "required by statute to be determined on the record after opportunity for an agency hearing," or, in any event, if such matter is "subject to a subsequent trial of the law and the facts *de novo* in a court." Thus, should the finding of the existence of a bounty or grant be considered adjudication (assuming, arguendo, the applicability of the APA), it is clear that the Secretary of the Treasury would not be obliged to hold a hearing prior to the imposition of countervailing duties for two separate and independent reasons: (1) there is no requirement in section 303 for a hearing or notice of hearing, and (2) the determination of the existence of a bounty or grant is triable *de novo* in the Customs Court (see *V. Mueller*, *supra*).

Instructive in considering the question here is a decision of the fourth circuit analyzing the scope of review available in the Tax Court in litigation concerning determinations by the Customs Service's sister agency—the Internal Revenue Service. *O'Dwyer* v. *Commissioner of Internal Revenue*, 266 F. 2d 575 (4th Cir.), *cert. den.*, 361 U.S. 862 (1959). The court first quoted the following statement of the Tax Court, with evident approval (Id. at 579–580):

> This Court is not subject to the Administrative Procedure Act. We do not review in the same sense as other courts perhaps review actions of the Federal Communications Commission or

some other federal agency. We do not review in that same manner the determinations of the Commissioner. This is a trial "de novo" and the question before me is simply whether or not the deficiencies determined by the Commissioner are correct. I have no means whatever of bringing before me the entire record, so-called, as you describe it, that was before the Commissioner. In fact, there probably is no such record. *When the Commissioner makes determination, he may have numerous documents before him. The determination may be made on the basis not only of those documents, but also on the basis of various conversations which may or may not be reduced to writing.*[18] *And it would be wholly impractical for this Court to undertake to review what you describe as the record before the Commissioner. There is no such record in any technical sense.* [Italic added.]

The fourth circuit, in affirming the decision of the Tax Court, proceeded to say (Id. at 580):

The provisions of the Administrative Procedure Act must be read and construed together and we hold that the judicial review of the "whole record" mentioned in section 10(e) envisages, in the case of adjudication, a review of the record made in cases wherein sections 5, 7, and 8 of the Act (5 U.S.C.A. §§ 1004, 1006, 1007: 60 Stat. 237 at pp. 239–240: 241–242) are applicable. Where these sections apply, the administrative agency is required to hold a formal hearing within a strict statutory framework and to make up a record of the testimony and exhibits introduced thereat, upon which record the agency must base its decision. This formal record is the subject of the review provided in section 10. To hold that section 10 applies to a determination of the Commissioner and that the Tax Court is a "reviewing court", within the meaning of that section, would be to hold that such determination is subject to the rigid requirements of sections 5, 7, and 8. Without a "record" to review, the provisions of section 10(e) would be meaningless and thus inapplicable here.

It has been held that the Bureau of Internal Revenue is exempt from the requirements of sections 5, 7, and 8 of the Administrative Procedure Act. *Cohen* v. *Commissioner*, 10 Cir., 1949, 176 F. 2d 394; *Kennedy Name Plate Co.* v. *Commissioner*, 9 Cir., 1948, 170 F. 2d 196. The Tax Court is given jurisdiction to redetermine the deficiency asserted by the Commissioner, and in doing so it is empowered to prescribe rules of practice and procedure and is required to apply the rules of evidence applicable to nonjury trials in the United States Court of the District of Columbia and make findings of fact upon such evidence. Sections 6213, 7453, and 7459, Internal Revenue Code of 1954, 26 U.S.C.A. sections 6213, 7453, 7459. The Tax Court thus renders its decision only upon the evidence produced before it. The burden of proof rests upon the taxpayer, and a decision of the Tax Court based upon the failure to sustain such burden was upheld. *Fairmont Aluminum Co.* v. *Commissioner*, 22 T.C. 1377, affirmed 4 Cir., 1955, 222 F. 2d 622.

[18] As previously pointed out, these considerations are fully applicable here.

> The Tax Court, rather than being a "reviewing court", within the meaning of section 10(e) reviewing the "record", is a court in which the facts are triable de novo and the burden is upon the taxpayer to come forward with evidence showing the determination of deficiency to be erroneous. We agree that the Tax Court is not subject to the Administrative Procedure Act.

From what has been said, it must be concluded that "countervailing duty decision-making" in the Customs Service/Treasury Department is quite analogous to the decision-making discussed in *O'Dwyer*. It clearly is "not" decision-making upon a record; it clearly is decision-making subject to *de novo* judicial review.

Instructive also are the following comments by the House Judiciary Committee in reporting out what was to become the Administrative Procedure Act (H. Rept. No. 1980, 79th Cong., 2d sess. 45–46 (1946)):

> The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. For example, statutes providing for "reparation orders," in which agencies determine damages and award money judgments, usually state that the money orders issued are merely prima facie evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending. *In other cases, the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review. Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in the Tax Court or the United States district courts. Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be.* Where a court enforces or applies an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule. Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity. *In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order because facts necessary to the determination of any relevant question of law must be*

determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court. [Italic added.]

Defendant, however, relies on *Suwannee Steamship Co.* v. *United States*, 79 Cust. Ct. 19, C.D. 4708, 435 F. Supp. 389 (1977), as support for its position that the scope of review is limited to the question of whether the Secretary's decision was arbitrary or capricious. But *Suwannee* is totally inapposite. In that case, the plaintiff, a steamship company, brought an action in this court to recover customs duties paid on certain repairs made in foreign ports to its vessel. It maintained that the duties should have been remitted by the Secretary of the Treasury because the foreign repairs were the result of a casualty. The relevant statutes were 19 U.S.C. 257 and 258 as written prior to January 5, 1971. Duties on the vessel's repairs were assessed pursuant to section 257 which provided in pertinent part:

> § *257 Duty on equipments or repair parts for vessels.*
>
> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum or the cost thereof in such foreign country; * * *.

The plaintiff's application for remission of the duties paid was made under § 258, providing in pertinent part:

> § *258 Remission for necessary repairs.*
>
> If the owner or master of such vessel furnishes good and sufficient evidence—
>
> (1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination; * * *
>
> * * * * * * * *
>
> then the Secretary of the Treasury is authorized to remit or refund such duties, * * *.

The defendant previously moved to dismiss the action asserting that the court lacked jurisdiction. It contended that the statutory authority conferred upon the Secretary of the Treasury to remit repair duties was entirely discretionary, and that the exercise of that discretion was final and not subject to judicial review. The court held, however, that the contention was without merit. *Suwannee Steamship*

Company v. *United States*, 70 Cust. Ct. 327, C.R.D. 73-3, 354 F. Supp. 1361 (1973). The court advanced two reasons for its holding. The first reason was that there was a strong presumption in favor of judicial review of administrative action and that indeed judicial review of such administrative action was the rule and nonreviewability an exception which must be demonstrated. The second reason set forth by the court was that defendant's assertion that the Secretary's exercise of discretion was judicially unreviewable ignored the mandate of section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), which provides:

> § *706 Scope of Review.*
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * * * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law; * * *. [Italic in original.]

Against this background, the court in the second *Suwannee* case, *supra*, 79 Cust. Ct. 19, concluded: (1) That judicial review of administrative action based upon the exercise of discretionary authority is available to assure that the administrative action is not arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law; (2) that in cases of express delegation of discretionary authority, where the administrative action is not contrary to law and has a rational basis, the courts will not substitute their judgment for that of the administrator; and (3) that where no formal record of the administrative proceeding is made, the agency determination must be accompanied by an explanation of its action sufficient to enable the reviewing court to determine whether the action was reasonable. Tested by these standards, the court held that the Secretary acted reasonably and did not abuse his discretion by refusing to remit the duties paid on the foreign repairs to the vessel. And since the Secretary's action was not shown to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the action was dismissed.[19]

From the foregoing, it is apparent that there is a basic difference between *Suwannee* and the situation here. For in *Suwannee*, the Secre-

[19] In *Michelin* v. *United States*, *supra*, C.R.D. 79-6, slip op. at 57-61, another judge of this court in dictum disagreed that secs. 257 and 258—covering duty on ship repairs and remissions for necessary repairs—provided "discretionary" authority to the Secretary to remit the duties. Rather, the court in *Michelin* was of the view that the statutory provisions in question were "mandatory" in nature so that the scope of review was via a de novo proceeding rather than a review of the administrative record.

tary was delegated by the Congress *discretionary* authority. Here, by contrast, it is clear from what has been said that Congress intended in the Trade Act of 1974 that absent the three specified conditions precedent to the invocation of the discretionary waiver authority in 19 U.S.C. 1303(d)(2), the countervailing duty law be enforced on the basis of the *unambiguous* statutory language and the case law construing it. Put otherwise, Congress did "not" intend to give the Secretary of the Treasury a broad grant of discretion. To the contrary, Congress intended that the countervailing duty statute be enforced *"in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303."* S. Rept. No. 92–1221, 92d Cong., 2d sess. 8 (1972), *supra*. (Italic added.) Perhaps, in this regard, it is well to repeat what has been said before that the language of section 303 of the Tariff Act is "mandatory" and that whenever a bounty or grant has been conferred, the Secretary "must" impose countervailing duties.

Defendant also relies on *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978), where this court held that the scope of review of an International Trade Commission's finding of injury under the Antidumping Act was, among other things, arbitrary or capricious, an abuse of discretion, or otherwise contrary to law. But there again, a determination of whether or not there was injury under that law is committed by Congress to the sound discretion of the Commission. Furthermore, under the Commission's practice, an administrative record is made, hearings are held, cross-examination of witnesses is permitted and specific and detailed findings are made.

Additionally, defendant relies on the decision of the Court of Customs and Patent Appeals in *Hammond Lead, supra*, as support for its position that review is limited to review of the administrative record. The following dictum in that case is pertinent (58 CCPA at 141):

> The Congress may well have intended the scope of section 516(b) to be all the scope to litigate the domestic industry should be allowed to have. Of course, any customs exaction benefits the domestic industry to the extent it hinders the importer and weakens him financially and as a competitor. The need of the domestic industry for full enforcement of regular duties, however, might have appeared to Congress much greater than in the case of *penal* or *retaliatory exactions*. The former may be the basis on which capital is invested and production planned. No one would depend on the continuance of an exaction, the very purpose of which is to end the practice that called it into being. Thus it may be that any decision limiting 516(b) may correspondingly limit the access of a complaining domestic industry to any kind of court relief. On the other hand, the modern tendency to fashion a remedy for any injury is a strong one, and *it could be the regular courts would take jurisdiction in cases outside section 516(b), where the domestic industry showed clear illegality and substantial injury. Such a proceeding would not be a de novo determination like the*

> *one the court below made here, but would, we think, be more in the nature of a review of the administrative decision, which would be overturned only if found arbitrary, capricious, or not founded on substantial evidence.* A court considering the fashioning of such relief would have to consider its need in light of judicial remedies, and also such extra-judicial ones as the domestic industry might have, in resort to the Congress or to the Tariff Commission. We do not undertake to predict the answer. [Italic added.]

More specifically, the court in *Hammond Lead* (as previously explained in detail) had determined that an American manufacturer had no right under 19 U.S.C. 1516 (as it then existed) to challenge negative countervailing duty determinations. It went on to suggest by way of the foregoing dictum that "it could be the regular courts would take jurisdiction in cases *outside* section 516(b), where the domestic industry showed clear illegality and substantial injury." [Italic added.] Then, to "contrast" the kind of review that would be available in a district court proceeding with the review available in a section 516 proceeding in this court, the Court of Customs and Patent Appeals pointed out that "[S]uch a proceeding would not be a *de novo* determination like the one the court below made here * * *." Stated differently, the Court of Customs and Patent Appeals did not criticize this court for holding a trial *de novo*; instead, the court indicated that that is the kind of review available in this court (when this court has subject matter jurisdiction).

Finally, it is interesting to note that in 1978, at the request of the Department of Justice, a bill, S. 2857, entitled the Customs Court Act of 1978, was introduced and a hearing held thereon. See hearing before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 2857, 95th Cong., 2d sess. (1978). Section 2640 of the bill provided that if an American manufacturer, producer, or wholesaler challenged a decision of the Secretary of the Treasury under the countervailing duty statute that certain imported merchandise had not received the benefit of a bounty or grant, a trial *de novo* would "not" be available but rather, as specified in the Administrative Procedure Act, judicial review would be limited to whether the Secretary's decision was arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law. See hearing, id. at 25, 26. What is more, the statement of the Department of Justice in explanation of this provision makes it clear that it was "not" intended to be of a "clarifying" nature. Thus, the Department explained (hearing, p. 56):

> 6. If an American manufacturer, producer, or wholesaler wishes to challenge a decision of the Secretary of the Treasury, under the countervailing duty statute, that certain imported merchandise has not received the benefit of a "bounty or grant," he may do so by means of the procedure specified in subparagraph

> (d). A trial *de novo will not* be available. Judicial review *will* proceed as specified in the Administrative Procedure Act, except that the "substantial evidence" test will not be applicable. [Italic added.]

It is important to add that the bill was "not" enacted.

In sum—and for the reasons indicated—the court rejects the defendant's contention that the scope of review is limited to the question of whether the Secretary's decision was arbitrary or capricious.

But even assuming that there is any validity to the defendant's contention—and there is none—the Secretary's negative determination is also arbitrary and capricious and contrary to law. As indicated earlier, none of the factors employed by the Secretary in making this determination is relevant. In fact, as the record makes manifest, defendant has demonstrated (1) an inability to articulate the reason that the ad valorem size of the benefit was a factor in the Secretary's negative determination, when that benefit was admittedly greater than *de minimis;* (2) an inability to articulate the reason that the level of exports was a factor in the Secretary's negative determination when (a) that level was known to the Secretary when he issued his "final" "affirmative" determination on January 7, 1976, (b) that level was greater than *de minimis*, and (c) the amount of bounty per unit exported is the same whether the level of export is miniscule or great; and (3) an inability to demonstrate that the "effect" of the regional development programs is other than the bestowal of bounties or grants, as contemplated by section 303.

With respect to the last point, in an apparent effort to circumvent the teaching of *Nicholas* that the "purpose" of a Government program is irrelevant, defendant has asserted that the Secretary took into account the "effects" of the programs, not the "purpose." Defendant has further asserted that effects were not in the form of "premiums" but rather "offsets," arguing that the former are countervailable bounties or grants while the latter are not.

Actually, the Secretary made no findings at all with respect to the effects of the Italian programs. All that was said in the published countervailing duty order of March 8, 1977, here in issue was that the the Italian Government advised Treasury of certain matters. Further, in its response to the plaintiffs' interrogatory No. 23, defendant said that the Italian Government spoke of design—that is, "purpose"—of that Government's programs.

Finally, to say that the "effect" of the Italian programs was not to provide a premium, but rather to provide an "offset" is irrelevant. In *Nicholas*, the importer made essentially the same argument that the defendant is making here. Nicholas urged that the payments there in issue were not "premiums" but were nothing more than compensation—

"offsets"—for certain additional costs experienced by distillers as a result of Great Britain's peculiar and complex excise regulations. The payments, it was argued, did not even compensate the loss they were intended to reimburse. 249 U.S. at 37–38. However, the Supreme Court rejected the argument, stating (id. at 39):

> We do not think that it is a repelling answer to say that * * * [the spirits] are sold here at the same price that they would be sold for in the United Kingdom if the latter imposed no tax; that is, sold here as if they had not been taxed at all, and therefore sold not below their natural cost. This is mere speculation of the effects of a different situation.

The court was of the view that "[t]here can be * * * but one inquiry: Was something—bounty or grant—paid or bestowed upon the exportation of spirits?", id. at 39, and it answered in the affirmative.

Here, too, there can be but one inquiry: Was something—bounty or grant—paid or bestowed upon the manufacture or production or export of float glass? Defendant has admitted as much. Further inquiry is neither relevant nor necessary.

Remand Is Not Permissible

Defendant urges that if this Court should determine that the Secretary's decision was erroneous, the court should not proceed to make a determination as to whether a bounty or grant exists, but should stay proceedings and order the Secretary to consider the matter anew. The request is without foundation and is rejected.

In the Customs area, this court has always substituted its opinion on matters of law for the opinion of the Secretary of the Treasury or his delegate, when this court believed the latter to be incorrect. When the court disagrees with a tariff classification decision, it does not remand for the purpose of permitting the making of an administrative classification decision consistent with the court's—it orders reliquidation in accordance with the court's decision.

Similarly, in the three countervailing duty cases where the court has disagreed with the Secretary's determination, the court did not remand to permit the Secretary to make a new determination. In *Energetic Worsted Corp.* v. *United States*, 51 Cust. Ct. 55, C.D. 2413 (1963), *rev'd*, 53 CCPA 36, C.A.D. 874 (1966), this court in its judgment in conformity with the mandate of the Court of Customs and Patent Appeals ordered, adjudged, and decreed that judgment be "entered sustaining the protest claims that the assessment of countervailing duties on the wool tops in question was and is illegal and void, and that the said merchandise is not subject to any countervailing duties, and the district director at the Port of Philadelphia is directed to reliquidate the entries accordingly." In *Hammond Lead Products*, 63 Cust. Ct. 315, *supra*, *rev'd on jurisdictional grounds*, 58 CCPA 129,

supra, this court in its initial judgment ordered, adjudged, and decreed "that the American manufacturer's protest in this case be, and the same hereby is, sustained and the district director of Customs at Laredo, Tex., will reliquidate the entry by adding, pursuant to section 303 of the Tariff Act of 1930, an additional duty equal to the amount as found by the Secretary of the Treasury, of the bounty or grant bestowed by the Mexican Government upon the exportation of lithargе." And in *Zenith Radio Corporation* v. *United States*, 78 Cust. Ct. 59, C.D. 4691, 430 F. Supp. 242 (1977), *rev'd*, 64 CCPA 130, *supra*, *aff'd*, 437 U.S. 443, *supra*, this court, in its judgment order, directed the Secretary of the Treasury "to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this order." Indeed, at no time during the *Zenith* litigation did the government question the authority of this court to make the determination that a bounty or grant has been bestowed.

Now, defendant contends—without any basis—that this court should not make that legal determination, and urges a result which cannot be harmonized with (1) subsections (e) and (g) of 19 U.S.C. 1516;[20] (2) the mandate for expeditious handling of American manufacturers' litigation in 28 U.S.C. 2633 and 28 U.S.C. 2602; and (3) the mandate for expeditious handling of countervailing duty cases in 19 U.S.C. 1303(a)(4).

In support of its request for a stay, defendant relies primarily on *United States* v. *Bianchi & Co.*, 373 U.S. 709 (1963). Such reliance is totally misplaced. *Bianchi* involved the interpretation of the so-called Wunderlich Act which provides in substance that a decision of a government agency on a question of fact pursuant to the "disputes" clause in a government contract shall be final and conclusive unless the decision is arbitrary or capricious or is so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. The controversy arose as follows: A Government contractor claimed additional compensation under his contract. The contracting officer denied his claim, whereupon an appeal was taken to the Government agency's board of claims and appeals. An adversary hearing was held before the board, at which a record was made, and

[20] These subsections make clear the congressional intention that entries made after the publication of a court decision favorable to the American manufacturer shall be liquidated in accordance with the final judicial decision in the action.

each side offered its evidence and had an opportunity for cross-examination. 373 U.S. at 711. The board ruled for the Government, following which the contractor filed suit in the Court of Claims. The Court of Claims heard the controversy *de novo* and found for the contractor. The Supreme Court granted the Government's petition for certiorari, reversed the Court of Claims, and held that judicial review must rest solely on consideration of the administrative record.

Among other things, the respondent-contractor contended before the Supreme Court that the Court of Claims had no power to remand such a case to the agency concerned and thus if the administrative record was defective or inadequate, or revealed the commission of some prejudicial error, the court could only hold an evidentiary hearing and proceed to judgment. The Supreme Court said there were two answers to this contention. First, there would undoubtedly be situations in which the Court of Claims would be warranted on the basis of the administrative record [21] in granting judgment for the contractor without the need for further administrative action. Second, in situations where the court believed that the existing administrative record did not warrant such a course, but that the agency determination could not be sustained under the standards laid down by Congress, the court could stay its proceedings pending some further action before the agency. Such a stay, the court continued, would be justified where the agency failed to make adequate provision for a record that could be subject to judicial scrutiny. Concluding, the court observed that where the agency failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment was always available to the court. 378 U.S. at 717–718.

Merely to recite this background and holding in *Bianchi* is enough to establish its complete irrelevance here.

The only other case relied on by the defendant in support of a request for a remand is *Voss International Corp.* v. *United States*, 78 Cust. Ct. 130, C.D. 4698, 432 F. Supp. 205 (1977). In that case, an importer challenged the imposition of special dumping duties. In his first cause of action, he contended that the Tariff Commission's determination of injury was invalid under 19 U.S.C. 160(a) on the ground that it was achieved by a 2-to-2 vote of the five Commissioners who attended the meeting, while the fifth Commissioner present at the meeting declined to vote.[22] Defendant contended that the affirmative determination of injury by the Commission was valid, as a matter of law, on the basis of the "evenly divided" provision in 19 U.S.C.

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[21] Here of course, as explained previously, there is no "administrative record" nor is one required.

[22] 19 U.S.C. 160(a) provides in relevant part:

> • • • For the purposes of this subsection, the said [Tariff] Commission shall be deemed to have made an affirmative determination [of injury] *if the Commissioners of the said Commission voting are evenly divided* as to whether its determination should be in the affirmative or in the negative. [Italic added.]

160(a). Defendant asked, however, in the alternative, that if the court concluded that the Commission determination contained a procedural flaw, the case be remanded to the Commission so as to afford that agency an opportunity to consider again, by way of a new vote, the question of injury. This court granted the alternative request for a remand based on the court's desire to avoid needless judicial controversy. For on remand, had all members of the Commission voted on the injury question or had the fifth Commissioner actually voted, all controversy as to the validity of the injury question would have been avoided. See 78 Cust. Ct. at 136, n. 5.[23] Again, the *Voss* case is totally irrelevant here.

Date for the Imposition of Countervailing Duties

The court having determined that imports of float glass produced by SIV should be countervailed, there remains the question as to the date for the imposition of such duties in accordance with this decision. Section 516(g) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(g)) provides:

> If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of *publication* of the court decision, shall be subject to appraisement, classification, and the assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated or, if necessary, reliquidated in accordance with the final decision. [Italic added.]

Plaintiffs relying on 73 C.J.S. *Publication* (1951) note that the word "publication" means making public; making known to the public; making available for public scrutiny. Thus, plaintiffs argue that as used in section 516(g), the term "publication" can only refer to the making available to the public of court decisions—that is, the filing or entry of court orders and opinions, and does not mean "reporting" or "printing" in an unspecified journal or reporter. Defendant, on the other hand, contends that "publication" means publication by the Secretary of the Treasury in the CUSTOMS BULLETIN.

In the only section 516(d) case which has been decided to date, *Zenith Radio Corporation* v. *United States*, 78 Cust. Ct. 59, *supra*, this court ordered the assessment of countervailing duties on entries

[23] Subsequently, the court was advised that the Commission, after careful consideration, chose to stand by its original vote and corresponding determination on injury. Thereafter, the court held that the Commission's determination of injury was procedurally valid. 78 Cust. Ct. 130.

made on or after the day following the date of entry of the court's order. 11 CUST. BULL. No. 19, at 79. On appeal, the Government challenged (1) this court's determination that a bounty or grant had been bestowed; and (2) this court's order that countervailing duties be assessed on entries made on or after the day following entry (rather than publication in the CUSTOMS BULLETIN) of this court's decision. The Court of Customs and Patent Appeals reversed on the first issue but specifically declined to reach the second issue. *United States v. Zenith Radio Corporation*, 64 CCPA at 133, n. 8. The two dissenting judges in *Zenith* did reach the issue and expressed agreement with the Government's position, stating (64 CCPA at 163–164):

> Section 257 of 28 U.S.C. provides that all decisions of the Customs Court shall be filed and be open to inspection and that the Secretary shall *publish* weekly such decisions as he or the court may designate and abstracts of all other decisions. Thus, the statutes distinguish between filing or entry of a decision and *publication* thereof, which obviously would not occur simultaneously with the filing or entry. Until January 4, 1967, publication was in "Treasury Decisions." Effective January 4, 1967, the name was changed to "CUSTOMS BULLETIN" (31 F.R. 16580). [Italic in original.]
>
> Although appellee argues that "publication" means "making available to the public," which would occur upon the filing or entry of court orders and decisions, I am satisfied that the word "publication" in section 516(g) and the word "publish" in section 257 are in pari materia; further, that acquiescence by Congress in the Secretary's practice of carrying out its mandate in section 257 creates a presumption of Congressional approval of that practice. Appellee has provided no evidence clearly showing Congressional disapproval of that practice.

However, as has been noted, the majority of the Court of Customs and Patent Appeals expressed neither agreement nor disagreement with that aspect of this court's order pertaining to the effective date for assessment. Nor did the Supreme Court reach the issue.

I must respectfully disagree with the dissenting judges of the appellate court in their interpretation of section 516(g) and conclude that the three-judge panel of this court was correct, for the following reasons:

First: One cannot properly impute the intent of publication in the weekly CUSTOMS BULLETIN when Congress merely said "publication." When Congress meant "published [publication] in the weekly CUSTOMS BULLETIN (Treasury decisions)" it said so. See 19 U.S.C. 1516(b); 19 U.S.C. 1315(d). One cannot draw any inference from 28 U.S.C. 257 with respect to 19 U.S.C. 1516(g). Section 257 does not mention the CUSTOMS BULLETIN at all, and neither that section nor any other statute refers to the publication of customs decisions

of this court, the Court of Customs and Patent Appeals or the Supreme Court in any periodical.[24]

Second: The legislative history of 19 U.S.C. 1516(g), which we now consider, clearly demonstrates that "publication" was not intended to mean "publication in the weekly CUSTOMS BULLETIN."

Section 516(b) of the Tariff Act of 1930, as originally enacted, provided for the suspension of liquidations of imported merchandise while an American manufacturer's protest was being litigated in the Customs Court. 46 Stat. 687. Thus, if American manufacturers were successful in litigation, the effect of any judgment reached back to those importations made during litigation.

However, the Treasury Department was of the view that certain American manufacturers were abusing this vehicle—i.e., were filing protests in order to inject uncertainty into importers' affairs, and the Department supported legislation which was to become the Customs Administrative Act of 1938, 52 Stat. 1077, and which amended section 516 by introducing the language now in issue.

At the hearings before the Ways and Means Committee, the Treasury Department representative explained the purpose of the proposal (which spoke of "publication of the court's decision"), as follows (Hearings before the House Ways and Means Committee on H.R. 6738, 75th Cong., 1st sess. 99 (1937)):

> The present amendment will not in any way preclude the domestic manufacturer, wholesaler, or producer from carrying his protest from the Secretary's decision as to classification or duty rate to the customs courts. All it will do is eliminate as far as possible the protracted period of suspension of liquidation during which importers do not know what duties they are going to have to pay.
>
> The amendment incorporated in section 15 of the present bill provides that the decision of the Secretary of the Treasury, adverse to the complainant, will remain in effect; that is, that imports may be imported or withdrawn from warehouse at the existing duty rate *until the first decision of the customs courts, whether it be the lower or the upper court, adverse to the Secretary's decision. If the customs court hands down a decision adverse to the Secretary's decision, that would make, of course, a prima-facie case for the merits of the domestic manufacturer's, wholesaler's, or producer's position.* And then prospectively, and prospectively only, the higher duty rates come into effect, but they will not be retroactive, as they are at present, for periods running up to 3½ years, during which the liquidation of all entries of merchandise involved in any such protest is suspended. *In other words, the results of a successful domestic protest will apply only to importations subsequent to a judicial ruling sustaining the protest and not, as at present, to*

[24] The term "publication of the court's decision" in 19 U.S.C. 1516(g) clearly refers to decisions of the Court of Customs and Patent Appeals and the Supreme Court as well as this court.

importations made in some cases several years prior to such a ruling. [*Italic* added.]

The Ways and Means Committee reported out the bill stating, with respect to the relevant section: "Under the new law importers may import their merchandise upon payment of duties in accordance with Treasury findings until a prima facie case against the correctness of such findings is made by a judicial decision adverse to the Treasury's findings. H. Rept. No. 1429, 75th Cong., 1st sess. 4 (1937).

While the Senate Finance Committee also approved the proposal, that committee introduced an amendment to give American manufacturers' protests "a preferred status on the dockets of the customs courts". S. Rept. No. 1465, 75th Cong., 3d sess. 9–10 (1938). At the Senate-House conference, the House receded, H. Rept. No. 2677, 75th Cong., 3d sess. 7 (1938), and the proposed amendment to expedite became law. (This is now codified in 28 U.S.C. 2633 and 2602.)

What is clear from the foregoing is that: (1) Congress wished to correct the situation under which importations could be subjected to extended periods of uncertainty during American manufacturers' litigation; (2) in resolving this situation, Congress was mindful of the diminution of American manufacturers' rights—i.e., the benefit of a favorable judgment would no longer be applicable to importations made during litigation; (3) Congress contemplated application of the American manufacturers' claimed rate of duty on entries, once there was a prima facie showing of correctness—a favorable court decision; and (4) Congress, in wishing to preserve and protect American manufacturers' rights, now that decisions in American manufacturers' cases could no longer reach merchandise entered while litigation in the trial court was pending, directed that American manufacturers' litigation be treated expeditiously. The foregoing demonstrates that Congress did not wish to have American manufacturers' rights lessened further by requiring them to wait three to four weeks after a favorable decision—a prima facie that their claim was just—before benefitting therefrom.[23]

Third: Whenever Congress requires publication in the weekly CUSTOMS BULLETIN (or Treasury decisions) it is for the purpose of providing a certain grace period to affected members of the public. Thus, 19 U.S.C. 1315(d) provides:

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[23] Pertinent also are the following comments of the House Ways and Means Committee with respect to the amendment to the Trade Act of 1974 allowing judicial review of negative countervailing duty determinations (H. Rept. No. 93-571, 93d Cong., 1st sess. 77 (1973)):

> Following the first judicial decision not in harmony with the Secretary's decision, liquidation of all entries of the subject merchandise subsequent to that decision is suspended pending a final judicial decision. If that decision is sustained on appeal, the merchandise concerned is subject to appraisement, classification, or assessment of duty in accordance with the final decision and effective as of the day after the date of the first judicial decision. The same procedure will be followed in cases involving negative countervailing duty determinations wherein the court will determine whether or not a bounty or grant is being paid or bestowed on the merchandise in question.

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties or the imposition of countervailing duties under section 1303 of this title.

Similarly, 19 U.S.C. 1516(b), which harmonizes with section 1315 (d), provides:

> If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than 30 days after the date such notice to the petitioner is published in the weekly CUSTOMS BULLETIN shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

Under these statutory provisions, before the rate of duty or value is increased, importers will have an opportunity to enter goods, which on the date of publication are on the high seas or under contract to purchase. The passage of 30 days between the announcement of the new rate or value in the CUSTOMS BULLETIN and the effective date of the new administrative ruling is consistent with this statutory plan.

However, "the publication of the court decision" in section 516(g) is not for the purpose of establishing a grace period. The decision becomes effective the date after ("not" 30 days after) publication. If the first notice of an increased duty liability to the importers is the reporting of a decision in the CUSTOMS BULLETIN, clearly Congress did not intend to afford importers time to enter previously ordered merchandise (or merchandise in transit) at the preexisting rate of duty. The clear purpose of section 516(g), unlike the "change of practice" provisions, is to establish a cutoff date, i.e., the date on which entries become susceptible to a court decision.

From what has been said, it follows that interpretation of the term "publication" in section 516(g) does not mean "publication in the CUSTOMS BULLETIN." Rather, it is concluded that this court's reading of section 516(g) implicit in its order in *Zenith* was correct and should be followed in this case.

Conclusion and Order

In view of all the foregoing, the court holds that the payment or bestowal of the grants in question upon the manufacture or production of float glass in Italy by SIV are bounties or grants within the ambit of the countervailing duty law.[26]

It is therefore ordered that plaintiffs' motion for summary judgment be granted and that defendant's cross-motion for summary judgment be denied.

It is further ordered that the Secretary of the Treasury (1) ascertain and determine or estimate the net amount of the bounties or grants paid or bestowed upon the manufacture or production of float glass in Italy by SIV; and (2) direct the appropriate Customs officers throughout the United States to assess countervailing duties thereon, in said net amount equal to the said bounties or grants, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this order.

[26] For the reasons set forth in this opinion, I must respectfully disagree with the decision of Judge Ford in *ASG Industries, et al.* v. *United States*, C.D. 4782, *supra*, holding that bounties or grants on float glass produced in West Germany were not countervailable on the ground that they did not tend to distort international trade. Similarly, I must respectfully disagree with the decision of Judge Landis in *ASG Industries, et al.* v. *United States*, C.D. 4788, *supra*, holding that benefits extended to a British float glass producer under a British regional development program did not constitute bounties or grants on the basis that the Secretary of the Treasury had wide discretion in determining what acts of foreign governments confer bounties or grants and that in the instant case the Secretary's interpretation was sufficiently reasonable.

(C.D. 4795)

PVO INTERNATIONAL, INC. *v.* UNITED STATES

On Motion To Dismiss for Failure of Condition Precedent and on Cross-Motion to Have Customs Form 4315 Filed Nunc Pro Tunc

Court No. 77-11-04655

Port of New York

[Defendant's motion granted.]

(Decided April 3, 1979)

Rivkin Sherman and Levy (*Dorothy P. Watson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

RE, Chief Judge: Plaintiff has brought this action to obtain a refund of Customs duties which it claims were improperly assessed on excess

moisture and impurities in five shipments of crude palm kernel oil imported from Zaire, Sumatra, and Malaysia. Pursuant to rule 4.7 (b)(3) of the rules of this court, defendant moved to dismiss the action for plaintiff's failure to comply with a condition precedent. Specifically, defendant contends that, since plaintiff failed to file Customs form 4315, "Application for Allowance in Duties", it has not complied with a condition precedent mandated by a valid regulation.

Plaintiff admits that Customs form 4315 was not filed for any of the entries of merchandise covered by this action. Nevertheless, it maintains that the failure to file was inadvertent and unintentional, and resulted from circumstances beyond plaintiff's control, namely, "the untimely death of its counsel." Arguing that the court, nonetheless, has jurisdiction over this action, and that the defendant will not be prejudiced by a late filing, plaintiff has moved to have the court order the Customs officials to accept the filing *nunc pro tunc* of Customs form 4315.

The following are the pertinent statutory and regulatory provisions:

> 19 U.S.C. 1507. "Tare and draft.
>
> The Secretary of the Treasury is authorized to prescribe and issue regulations for the ascertainment of tare upon imported merchandise, including the establishment of reasonable and just schedule tares therefor, but in no case shall there be any allowance for draft or for impurities, other than excessive moisture and impurities not usually found in or upon such or similar merchandise."
>
> 19 CFR 158.13. "Excessive moisture and other impurities.
>
> (a) *Application by importer.*—An application for an allowance in duties under section 507, Tariff Act of 1930 (19 U.S.C. 1507), for excessive moisture or other impurities not usually found in or upon such or similar merchandise shall be made by the importer on Customs form 4315. The application shall be filed with the district director within 10 days after the report of weight or gage has been received by the district director or within 10 days after the date upon which the entry or a related document was endorsed to show that invoice weight or gage has been accepted by the Customs inspector or other Customs officer.
>
> (b) *Allowance by district director.*—If the district director is satisfied after any necessary investigation that the merchandise contains excessive moisture or other impurities not usually found in or upon such or similar merchandise, he shall make allowance for the amount thereof in the liquidation of the entry.
>
> (c) *Limitations on allowance.*—No allowance under this section shall be made when forbidden by law or regulation; for example, schedule 1, part 6B, headnote 2, Tariff Schedules of the United States (19 U.S.C. 1202), provides that no allowance in weight shall be made for dirt or other impurities in seed of any kind provided for in that subpart."

The five shipments of crude palm kernel oil were entered at the Port of New York between December 1974 and March 1975. According to plaintiff, whose office is in San Francisco, Customs forms

4315 were prepared for each entry by its New York broker, and were forwarded to its New York attorney for filing. Plaintiff first retained this attorney in August 1974. The following October, the attorney died "suddenly and unexpectedly." Plaintiff explained that "since all of the client files remained at [the deceased attorney's] office pending appointment of new Customs counsel," plaintiff's broker continued to forward the completed forms to the attorney's office, even after his death.

In March of 1975, plaintiff retained its present counsel. New counsel timely filed protests seeking a refund of the duty assessed on that portion of the weight of the palm kernel oil which plaintiff considered to be excess moisture and impurities. The protests were denied, and plaintiff initiated this action by filing a summons and complaint. Defendant filed an answer to the complaint, and then moved for the dismissal which is the subject of the present controversy.

Plaintiff attributes its failure to have filed to the untimely death of its attorney. Furthermore, it claims that defendant will not be prejudiced by a *nunc pro tunc* filing because the issue of what constitutes the standard for "usual," in determining excess moisture and impurities, is not within the contemplation of the regulations. According to plaintiff, the purpose of requiring Customs form 4315 to be filed within 10 days after the report of weight has been received by the district director is to permit a reweighing or remeasuring of the goods in their condition when imported. However, plaintiff states that it is not objecting to the weight or measurement that the Customs officials have ascribed to the merchandise. Rather, it objects to that which the Customs Service determined was the "usual" excess of moisture and impurities in palm kernel oil. It asserts that Customs' understanding of what is "usual" excess in palm kernel oil is improperly low. Hence, plaintiff urges that, since "no reweighing or remeasuring is required and * * * the filing of Customs form 4315 serves merely to give notice of the importer's dispute regarding the relevant trade meaning of 'usual' excess moisture and impurities," the failure to file the necessary forms resulted in no prejudice to defendant.

The basic question presented is whether the allowance for excessive moisture or impurities is conditioned upon the filing of the prescribed Customs form 4315. Differently stated, does an importer, by failing to file this form, forfeit the right to obtain the statutory allowance?

The court has concluded that since plaintiff has not complied with a valid condition precedent, it cannot recover the statutory allowance.

Both this court and the Court of Customs and Patent Appeals have considered these questions. The decided cases teach that the filing of Customs form 4317 (now 4315) [1] is a mandatory condition precedent for the recovery of the statutory allowance. See *Socony Vacuum Oil*

[1] The change in the numbering of the form, from 4317 to 4315, was prescribed by T.D. 72-258 by which 19 CFR 158.13(a) superseded 19 CFR 15.7(a), effective Oct. 27, 1972.

Co., Inc. v. *United States*, 36 Cust. Ct. 214, C.D. 1777 (1956), *aff'd*, 44 CCPA 83, C.A.D. 641 (1957); *York Feather & Down Corp.* v. *United States*, 26 Cust. Ct. 231, C.D. 1329 (1951), *aff'd*, 40 CCPA 51, C.A.D. 496 (1952); *Velsicol Chemical Corp.* v. *United States*, 283 F. Supp. 93, 60 Cust. Ct. 249 (1968); *Cinder Products Corp.* v. *United States*, 52 Cust. Ct. 49, C.D. 2434 (1964).

Plaintiff, however, attempts to distinguish the present controversy from this line of cases. Citing *C. L. Hutchins & Co., Inc., et al.* v. *United States*, 331 F. Supp. 318 67 Cust. Ct. 60 (1971), it maintains that failure to file is not a jurisdictional defect. Hence, plaintiff contends that, since the court has jurisdiction, it can order the Customs officials to accept a nunc pro tunc filing of Customs form 4315.

The defendant responds that plaintiff's characterization of defendant's motion to dismiss, as being based on the court's lack of jurisdiction, misinterprets the defendant's motion. The defendant points out that rule 4.7(b) of the rules of the U.S. Customs Court provides for four separate grounds for moving to dismiss an action.

The question presented is not whether this court has jurisdiction, but rather, whether compliance with the filing requirement is a condition precedent to recovery. Dismissal of the action for failure to perform a condition precedent is an entirely different ground from dismissal for lack of jurisdiction.

Plaintiff's reliance on *C. L. Hutchins & Co., Inc., et al.* v. *United States*, 331 F. Supp. 318, 67 Cust. Ct. 60 (1971), to support its jurisdictional argument, is misplaced. The plaintiff in *Hutchins* first sought an allowance for excess impurities in its protest, but added a new claim in its complaint for improper classification. The defendant moved to dismiss the action for failure of a condition precedent since plaintiff had not filed Customs form 4317 (now 4315) required by section 15.7(a) of the Customs Regulations, as amended, the predecessor of the present regulation. Although the court denied the defendant's motion, it clearly noted the distinction between a dismissal for failure to comply with the regulations, and a dismissal for lack of jurisdiction.

In the *Hutchins* case, the court did not permit a waiver of the required filing of forms seeking an allowance for excess impurities. Rather, it gave effect to the congressional intent of not declining jurisdiction where new grounds in a complaint apply to the same merchandise and relate to the same administrative decision. Thus, while the court in *Hutchins* did not entertain the claim for excess impurities, because plaintiff failed to file the required form, it could nonetheless entertain the claim for improper classification because it involved the same merchandise that was the subject of the protest, and related

to the same contested administrative decision. In the present case, unlike *Hutchins*, the claim pertains solely to the allowance for excess moisture and impurities.

The defendant also denies that failure to file the forms was beyond plaintiff's control. Defendant maintains that the death of plaintiff's attorney did not make filing of the forms impossible or even onerous. It indicates that there is no requirement that the forms be filed by an attorney. They could have been filed by plaintiff or a representative. Furthermore, the death of plaintiff's attorney did not occur at a time of critical importance. The attorney died 2 months before the first form was due to be filed, and 5 months before the last form was due. The first shipment of merchandise was not even entered until 2 months after the attorney's death. Indeed, the facts reveal clearly that, with due diligence, plaintiff could readily have complied with the filing requirement. The resulting hardship cannot be attributed to any act, omission, or misconduct of the defendant. See *State Metals, Inc.* v. *United States*, 82 Cust. Ct. 91, C.D. 4793 (1979); *Wolf D. Barth Co., Inc.* v. *United States*, 81 Cust. Ct. 127, C.D. 4778 (1978).

The present case deals with a valid regulation that requires the filing of a particular form in order to obtain a statutory allowance. It makes no provision for late filing. In *F. W. Myers & Co., Inc.* v. *United States*, 374 F. Supp. 1395, 72 Cust. Ct. 133 (1974), the pertinent regulation expressly permitted the late filing of "a document, form or statement required by regulations" if the failure to file "was not due to willful negligence or fraudulent intent."

Since the regulations in issue are a valid exercise of the specific delegated authority, the following statements of the Court of Customs and Patent Appeals are particularly pertinent:

> Valid customs regulations made in pursuance of law have the force and effect of law and must be complied with as an act precedent to obtaining any special grant to which such regulations relate. [Citations omitted.] *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, 8, T.D. 48976 (1937).

The regulation which requires the filing of Customs form 4315 was issued pursuant to the specific authorization of 19 U.S.C. 1507. The decided cases show clearly that regulations promulgated by the Secretary of the Treasury pursuant to a specific statutory provision have the force and effect of law. Furthermore, they may impose conditions precedent to receive the benefits provided in the enabling statute. See *Socony Vacuum Oil Co., Inc.* v. *United States*, 44 CCPA 83, C.A.D. 641 (1957); *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937); *United States* v. *Browne Vintners Co., Inc.*, 34 CCPA 112, C.A.D. 351 (1946). See also *Swan and Finch*

Co. v. *United States*, 190 U.S. 143 (1903); *GAF Corp.* v. *United States*, 72 Cust. Ct. 153, C.D. 4526 (1974); *Carl Matusek Shipping Co., Inc., et al.* v. *United States*, 51 Cust. Ct. 8, C.D. 2406 (1963).

Plaintiff has failed to file Customs form 4315. Under the applicable case law, plaintiff, by not having complied with a mandatory condition precedent, is not entitled to the statutory allowance.

In view of the foregoing, the defendant's motion to dismiss is granted, and plaintiff's cross-motion is denied.

Let judgment be entered accordingly.

(C.D. 4796)

ADMIRAL CRAFT EQUIPMENT CORP. *v.* UNITED STATES

Wearing apparel

WEARING APPAREL—DISPOSABLE PLASTIC APRONS AND BIBS

Disposable plastic aprons and bibs were properly classified as wearing apparel composed of plastic. The protective purposes of the importations are consistent with the purposes of wearing apparel, and their disposable nature is irrelevant to their tariff classification. *Antonio Pompeo* v. *United States*, 40 Cust. Ct. 362, C.D. 2006 (1958) distinguished. *W. J. Byrnes & Co. of N.Y., Inc., et al.* v. *United States*, 38 Cust. Ct. 339, C.D. 1884 (1957) distinguished.

Court No. 77-12-04909

Port of New York

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Dated April 12, 1979)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Glenn E. Harris*, trial attorney), for the defendant.

OPINION AND ORDER

WATSON, Judge: This matter is before the court on cross-motions for summary judgment, and properly so, due to the absence of any issues of material fact.

The merchandise in dispute consists of plastic disposable aprons and bibs imported from Korea. The aprons are of the type which cover most of the wearer's front and are donned by inserting the head through a hole in the upper part and tying a central band around the waist. The

bibs are invoiced as lobster bibs. They are designed to be tied around the neck and are emblazoned with the picture of a red lobster "dormant."

This merchandise was classified as plastic wearing apparel under item 772.30 of the Tariff Schedules of the United States[1] (TSUS) and assessed with duty at the rate of 12.5 per centum ad valorem. Plaintiff claims that the merchandise is properly classifiable as other plastic articles not specially provided for under item 774.60, TSUS[2] and is consequently free of duty.

Plaintiff, having the burden of first overcoming the presumption that these articles are wearing apparel, argues that the term "wearing apparel" does not cover articles worn by humans essentially for protective purposes. As a general proposition this is obviously incorrect. An important, if not primary, purpose of wearing apparel is protection against the environment. No justification exists for distinguishing between articles worn for protection against the elements and those worn for protection against more localized conditions prevailing in the environment of the home, workplace, school, or restaurant. It is clear that textile articles similar to these importations have long been viewed as wearing apparel. *Henry E. Frankenburg et al.* v. *United States*, T.D. 12961—G.A. 1512 (1892); *Lamb & Griesbach* v. *United States*, T.D. 12110—G.A. 972 (1891); *G. & J. Ballin* v. *United States*, T.D. 11085—G.A. 528 (1891). See also, *Campbell, Metzger & Jacobson* v. *United States*, T.D. 34243—G.A. 7537 (1914). *Cf. Darlington, Runk & Co.* v. *United States*, 136 F. 716 (T.D. 26197)(C.C.E.D. Pa. 1905); *In re Spielman et al.*, 66 F. 724 (C.C.S.D.N.Y. 1894).

Contrary to plaintiff's assertion, its claim is not supported by the reasoning in *Antonio Pompeo* v. *United States*, 40 Cust. Ct. 362, C.D. 2006 (1958). In that case crash helmets used by motorcycle and auto racers were held not to be wearing apparel. However, the protective function of the helmets went far beyond that of general wearing apparel. The helmets were designed to protect the wearer against traumatic injury arising from unusual hazards. In fact, the court compared them to welders' face masks, divers' helmets and dress, policemen's bulletproof vests, and lead aprons worn by X-ray technicians. The importations involved herein clearly do not belong to the same category and therefore would not benefit from any interpretation of wearing apparel which excluded articles of a highly developed and specialized protective nature. For this reason also, the court does not

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[1] Item 772.30 reads as follows:

Wearing apparel (including rainwear) not specially provided for, of rubber or plastics.

[2] Item 774.60 and its related heading read as follows:

Articles not specially provided for, of rubber or plastics:

* * * * * * *

Other

find it necessary to enter into a discussion of defendant's criticism of the result in the *Pompeo* case.

As for the disposable character of the importations, there is no basis in the statute for distinctions derived from the relative durability of plastic wearing apparel.

The court has found one decision which requires further discussion. In *W. J. Byrnes & Co. of N.Y., Inc., The Museum of Modern Art* v. *United States*, 38 Cust. Ct. 339, C.D. 1884 (1957), paper slippers were held to be properly classifiable as manufactures of paper [3] rather than as footwear.[4] The paper slippers were imported to be worn by visitors to a Japanese house erected on the premises of the Museum of Modern Art in New York City. Two reasons for this holding were given by the court: First, that the provision for footwear was intended to include only coverings designed to protect the foot and to be worn for an indefinite period of time; and second, that the upper parts of the imported slippers were not composed of material specifically named in the footwear provision or substitutes therefor.

To the extent that the opinion in *W. J. Byrnes & Co.* considered the durability of an article as relevant to its classification it gave unwarranted importance to that characteristic. However, a number of special considerations were involved in that case which distinguish it from this one. The slippers were used to protect the floors of the Japanese house and not the wearers. More importantly, the material of which the slippers were composed was not named in the statute. Here, we have a special provision for wearing apparel composed of plastic. To exclude the imported aprons and bibs would therefore require the drawing of an even finer and more artificial distinction than was drawn in the *Byrnes* case. It would require the thankless task of determining the relative durability and disposability of articles made of the same basic material and belonging to the same general class—all this without any legislative indication that the distinction is germane.

A provision for wearing apparel is a classification by use. *Cf. United States* v. *Hillier's Son Co.*, 14 Ct. Cust. Appls. 216, T.D. 41706 (1926). Accordingly the test of whether an article falls within the classification is whether it belongs to the class of articles used as wearing apparel. See *Bangor & Aroostook Railroad Co. et al.* v. *United States*, 20 CCPA 96, T.D. 45724 (1932).

The duration of an article's use is irrelevant to a determination of this nature. If the importation belongs to the class of articles used as wearing apparel it is classifiable as such.

[3] The relevant provision was par. 1413 of the Tariff Act of 1930, as modified by the Annecy Protocol of Terms of Accession to the General Agreement on Tariffs and Trade, T.D. 52373, supplemented by Presidential proclamation, T.D. 52462.

[4] Par. 1530(e) of the Tariff Act of 1930.

In light of the above conclusions, it is not necessary to reach defendant's additional argument that these articles are within the trade meaning of wearing apparel. The common meaning of the term adequately disposes of the matter. See generally, *Maillard et al.* v. *Lawrence*, 57 U.S. (16 How.) 251 (1853).

It is therefore ORDERED that plaintiff's motion for summary judgment be denied and defendant's cross-motion for summary judgment be granted.

(C.D. 4797)

LAWRENCE BRAVERMAN *v.* UNITED STATES

Plastic materials

Court Nos. 70/18972 and 70/18973

Port of Houston

[Judgment for defendant.]

(Decided April 18, 1979)

David S. Komiss and *Morris Braverman* for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

WATSON, Judge: In this action plaintiff is contesting the classification of two entries of merchandise as benzenoid plastic materials under item 405.25 of the Tariff Schedules of the United States (TSUS), dutiable at the rate of 2.5 cents per pound plus 16 per centum ad valorem.* Plaintiff claims that the proper classification should have been as waste and scrap, of plastic, under item 771.15 of the TSUS, dutiable at the rate of 3 per centum ad valorem. Plaintiff's alternative claim for classification as waste, not specially provided for, has not been pursued. Accordingly, it is deemed abandoned and is consequently dismissed.

With respect to plaintiff's claim for classification as plastic waste and scrap, it introduced no evidence directed toward proof of that claim. Instead, plaintiff resorted to an attack on the methods by which the Government arrived at its classification and the failure of the Government to provide samples of the importations.

However, plaintiff did not prove that the methods of sampling or testing were incorrect or that any other errors detracted from the presumptive correctness of the classification.

In addition, if samples of the importation were needed by plaintiff to prove its case the obligation to obtain those samples rested on plaintiff. *See L. B. Watson Co.* v. *United States*, 74 Cust. Ct. 193, C.R.D. 75–2 (1975).

For the above reasons judgment must be entered for the defendant. Judgment will enter accordingly.

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* The assessment of countervailing duty on the merchandise has not been challenged.

(C.D. 4798)

PHARMACIA LABORATORIES INC. *v.* UNITED STATES

Radioimmunoassay testing kits

DIAGNOSTIC TEST KITS CONTAINING A RADIOACTIVE COMPOUND

A diagnostic test kit, used to measure certain chemicals in blood serum, is not classifiable as a usefully radioactive chemical compound under item 494.50 of the TSUS. That provision does not describe importations which consist of a number of separate compounds in addition to one that is radioactive. In functional terms, the antibody component, which determines the specificity of the test, and the "standard" component, which provides a standard result against which to measure the result obtained from the serum under study, are no less important than the radioactive component which supplies the means of measurement. *Donalds Ltd., Inc.* v. *United States*, 32 Cust. Ct. 310, C.D. 1619 (1954); *United States* v. *Charles Garcia & Co., Inc.*, 48 CCPA 140, C.A.D. 780 (1961); *United States* v. *Aceto Chemical Co., Inc.*, 64 CCPA 78, C.A.D. 1186, 553 F. 2d 685 (1977); *United States* v. *Cavalier Shipping Co., Inc.*, 60 CCPA 152, C.A.D. 1103 (1973) distinguished.

Court No. 74-3-00675

Port of New York

[Judgment for defendant.]

(Decided April 18, 1979)

Murray Sklaroff for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Susan C. Cassell*, trial attorney), for the defendant.

WATSON, Judge: This action was commenced to contest the denial of plaintiff's protest against the tariff classification of four types of radioimmunoassay diagnostic testing kits. The kits are used to detect the presence of certain chemicals in blood serum in a manner detailed, *infra*. Most of the kits were classified under item 799.00 of the Tariff Schedules of the United States (TSUS)[1] as other articles not provided for elsewhere in the tariff schedules. They were assessed with duty at the rate of 6 or 5 percent ad valorem depending on the year of entry, pursuant to T.D. 68-9.

Plaintiff claims that the kits are properly classifiable under item 494.50 of the TSUS as a usefully radioactive chemical compound and should therefore be free of duty.

The parties are in agreement that these kits are entireties for the purpose of classification, and plaintiff further agrees that if the articles are not classifiable as it claims, the classification under item 799.00 is correct.

[1] Some entries were classified under item 429.95, 432.00, or 439.50. Defendant concedes the error of those classifications and, as to them, requests judgment without the affirmance of the classifications.

The short answer to plaintiff's claim is that the individual kit is not a chemical compound in its physical form. It is not a compound within the meaning of headnote 2 of schedule 4 [2] and does not come within the plain meaning of the claimed item.

Each imported article is a kit containing four or five separate vials, only one of which contains a radioactive substance. Thus, each kit is a collection of four or five distinct and separate compounds. In its imported form the kit is therefore not adequately or specifically described, in its entirety, as a usefully radioactive compound. The kits are simply too diverse in their contents to be properly described by the claimed provision. In short, the claimed provision cannot be interpreted to cover the importations. *The Englishtown Corporation* v. *United States*, 64 CCPA 84, 87, C.A.D. 1187, 553 F. 2d 1258 (1977).

Plaintiff has stressed the function of the radioactive material, but even this line of argument could not obviate the separate existence of the other substances. Assuming, however, that the court was to enter into a functional analysis of the importations, the result would not be different.

The kits contain specific antibodies for the chemical sought to be measured. In essence, the antibody component is mixed with the radioactive component and with the blood serum under scrutiny. The chemical being measured competes with the radioactive material for attachment to the antibody.

Following the separation of the resulting mass of antibody (bound with the chemical sought to be measured and with radioactive material) the radioactivity is measured. The reading of radioactivity is inversely proportional to the amount of the chemical sought to be measured. In other words, if the radioactivity reading is low this indicates a relatively greater presence on the antibody of the chemical sought to be measured and hence its greater presence in the blood serum being tested. If the radioactivity reading is high a lesser presence of the chemical being measured is indicated.

A determination of the quantity of the chemical is then made by comparing the radioactivity readings obtained from the unknown quantity with the readings obtained as a result of the same procedure done on a known quantity of the chemical sought to be measured. The known quantity is contained in the "standard" component of the kit.

[2] 2. (a) The term "compounds," as used in this schedule, means substances occurring naturally or produced artificially by the reaction of two or more ingredients, each compound—

(i) Consisting of two or more elements,

(ii) Having its own characteristic properties different from those of its elements and from those of other compounds, and

(iii) Always consisting of the same elements united in the same proportions by weight with the same internal arrangement.

The presence of impurities which occur naturally or as an incident to production does not in itself affect the classification of a product as a compound.

(b) The term "compounds," as used in this schedule, includes a solution of a single compound in water, and, in determining the amount of duty on any such compound subject to duty in this schedule at a specific rate, an allowance in weight or volume, as the case may be, shall be made for the water in excess of any water of crystallization which may have been in the compound.

This description reveals that there are at least two other components of these kits which are as important as the radioactive material; i.e., the antibody, without which the test would have no specificity, and the standard, without which the test result would be a meaningless reading of radioactivity. It would be impossible to ignore the essential contribution of these other components to the function of the kit by allowing the radioactive material alone to control the classification.

The cases cited by plaintiff are all distinguishable. In *Donalds Ltd., Inc.* v. *United States*, 32 Cust. Ct. 310, C.D. 1619 (1954), an inhaler, consisting of three parts, a holder, a cotton core, and a volatile liquid inhalant, was found to be an entirety, classifiable as a medicinal preparation, as against the Government's separate tariff treatment of the holder and its contents. The distinguishing feature of that case was the finding that the term "medicinal preparation" described the entire importation as a description of the use of the entirety. The tariff description claimed here is a description by physical form and characteristics which are not displayed by the entirety and therefore do not describe the entirety. The same distinction holds true for the classification of a fishing reel with two interchangeable spools as a fishing reel in *United States* v. *Charles Garcia & Co., Inc.*, 48 CCPA 140, C.A.D. 780 (1961).

Those cases [3] which deal with the question of whether minute ingredients should play a role in the classification of mixtures do not support plaintiff's position. In certain circumstances the quantity and function of minute ingredients may justify excluding them from consideration. Here, however, those components which plaintiff would exclude from consideration are in no sense minute. In fact, in their cumulative importance, in terms of function and quantity, they equal if not exceed the radioactive material emphasized by plaintiff.

In light of the above, judgment shall be entered for the defendant. In those instances in which the entries were classified under a provision other than item 799.00 the judgment is entered without affirmance of the classifications.

(C.D. 4799)

PISTORINO & COMPANY, INC. *v.* UNITED STATES

Shrines

Bronze carvings, called "pinnacles," assembled after importation from Italy to form a crown which was affixed as the top of a tower in the Madonna Queen National Shrine, below which stood a statue of Mary, the Mother of Christ, known as Madonna, Queen of the Universe, were held to be appurtenances or adjuncts of a shrine,

[3] *United States* v. *Accto Chemical Co., Inc.*, 64 CCPA 78, C.A.D. 1186, 553 F. 2d 685 (1977); *United States* v. *Cavalier Shipping Co., Inc.*, 60 CCPA 152, C.A.D. 1103 (1973).

under item 850.70 of the tariff schedules, and not "[a]rticles of copper, not coated or plated with precious metal," as classified, under item 657.35 of the schedules. From an examination of the previous location of the statue, as well as its present site, the testimony and exhibits of record, the statue known as Madonna, Queen of the Universe, at the Madonna Queen National Shrine in East Boston, is a shrine within the meaning of the tariff laws. As appurtenances or adjuncts of a shrine, the pinnacles are entitled to duty-free entry.

SHRINES—DEFINITION

The Madonna, Queen of the Universe statue was not an ordinary statue, but unique among statues. It was the object of special veneration and, therefore, constituted a shrine as defined by the pertinent cases. See *Acme Marble & Granite Company* v. *United States*, 324 F. Supp. 503, 66 Cust. Ct. 172 (1971). In the tariff sense, it is the essence of a shrine that the article, in and of itself, inspire and be the cause of the devotion paid to it. Its classification is not necessarily dependent on its location in relation to a building, nor on its size.

SHRINES—LIMITATIONS

Item 850.70 of the tariff schedules makes no reference to size or location of the articles enumerated. It does not specify or limit the number or kind of shrines, altars, pulpits, communion tables, baptismal fonts, mosaics, or iconostases which are entitled to duty-free entry. As an eo nomine provision, the term "shrines" includes all forms of shrines in the absence of any contrary legislative intent. *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, 470, T.D. 47464 (1935); *C. Wildermann Co.* v. *United States*, 56 Treas. Dec. 572, T.D. 43713 (1929).

SHRINES—APPURTENANCES OR ADJUNCTS

Item 850.70 of the schedules also permits duty-free entry to parts, appurtenances, or adjuncts of the articles enumerated, "whether to be physically joined thereto or not." On the particular facts presented, the pinnacles, in the form of a crown, though not physically joined to the Madonna, Queen of the Universe statue, belong, pertain, and relate specifically to that statue. As appurtenances or adjuncts to the statue, which is a shrine within the tariff laws of the United States, the pinnacles are appurtenances or adjuncts to a shrine.

Court No. 73-9-02584

Port of Boston

[Judgment for plaintiff.]

(Decided April 20, 1979)

Doherty and Melahn (*Walter E. Doherty, Jr.*, of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Mark K. Neville, Jr.*, trial attorney), for the defendant.

RE, Chief Judge: The legal question presented in this case pertains to the proper classification, for Customs duty purposes, of certain

bronze carvings imported from Italy. These carvings, called "pinnacles," were approximately 5 to 12 feet in length, and after importation were assembled to form a crown approximately 28 feet wide and 120 feet around. The crown was then placed or affixed as the top of a tower in a building complex in East Boston, Mass., known as the Madonna Queen National Shrine. On one facade of the tower, and below the crown, is a statue of Mary, the Mother of Christ, referred to as the Madonna, Queen of the Universe.

The bronze pinnacles were classified by the customs officials under item 657.35 of the Tariff Schedules of the United States [TSUS], as modified by T.D. 68–9, as "[a]rticles of copper, not coated or plated with precious metal: * * * Other." Consequently, they were assessed with duty at 0.6 cent per pound plus 7.5 per centum ad valorem.

Plaintiff protests that classification, and claims that the importation is properly classifiable under item 850.70 of the tariff schedules which covers "shrines" and "parts, appurtenances, or adjuncts" of shrines. If the imported pinnacles are properly classifiable under the claimed provision, they are entitled to be admitted free of duty.

The pertinent items of the tariff schedules provide as follows:

As classified:

	"Articles of copper, not coated or plated with precious metal:	
*	* * * * * * *	
657.35	Other	0.6¢ per lb. + 7.5% ad val."

As claimed:

	"Articles imported for the use of an institution organized and operated for religious purposes, including cemeteries, schools, hospitals, orphanages, and similar nonprofit activities staffed and controlled by such institutions:	
850.70	Altars, pulpits, communion tables, baptismal fonts, shrines, mosaics, iconostases, or parts, appurtenances, or adjuncts of any of the foregoing, whether to be physically joined thereto or not, and statuary * * *	Free"

Under item 850.70 of the tariff schedules, "parts, appurtenances, or adjuncts" of a shrine need not be "physically joined thereto." Plaintiff does not allege that the importation is a part. It does, however, contend that it is an appurtenance or adjunct of a shrine.

Since the imported merchandise is used by a nonprofit religious institution within the intendment of item 850.70, it is plaintiff's contention that it should be classified under item 850.70, and therefore enter duty free.

On the question of plaintiff's status the parties have stipulated that the importer, the Sons of Divine Providence, Inc., of Massachusetts, is an institution organized and operated for religious purposes, and that the Don Orione Rest Home is a nursing home staffed, operated, and controlled by this institution. The priests who are members of this religious order are known as the Don Orione Fathers. Although the defendant would not stipulate that the importer is a nonprofit organization, it offered no evidence to refute the testimony of Father Rocco Crescenzi, administrator of the home since 1952, that it is a nonprofit organization operated solely for religious and charitable purposes.

From the uncontradicted and reliable testimony of record, it is the determination of the court that the Sons of Divine Providence, Inc., of Massachusetts, qualifies as an institution entitled to duty-free entry under item 850.70 of the tariff schedules for the articles of merchandise enumerated in that provision.

The record and numerous exhibits submitted at the trial attest to the unique nature and character of the statue, the Madonna, Queen of the Universe. Plaintiff's contention that the statue is a shrine, or, in the alternative, that the building complex is a shrine, is best understood in relation to their history.

It is agreed that the statue of the Madonna is the focal point of the Madonna Queen National Shrine. Architectural plans for the building complex reveal that the Madonna Queen National Shrine, when fully completed, will consist of a tower, a plaza at street level, an underground church, and a subbasement chapel. The tower contains a total of six floor levels, three of which contain chapels dedicated to one of the three mysteries of the rosary. The top level of the tower contains a hall which also serves as an observation area. It is this hall-observation area which has, surrounding its roof, the pinnacles which were constructed to form the crown above the statue located below.

The statue, the Madonna, Queen of the Universe, is 35 feet high. It was moved to its present location on the north outer wall of the tower shortly before October 7, 1977, after the trial of this action. Prior to its removal the Madonna statue had been located, since 1954, directly across the street, and in front of the Don Orione Rest Home. The testimony of Father Crescenzi indicated that during all of this time votive candles had been lit before it, both day and night. Weather permitting, religious services and devotions were conducted at the statue daily, and more often on Sundays. Father Crescenzi's testimony not only attests to the fervent devotion of the faithful for the Madonna statue, but also that the devotion was a constant and continuing practice.

In its present position at the north facade of the tower, the Madonna statue is 176 feet above the ground. It faces a plaza known as "Pilgrims' Square," which has been described as an area most appropriate for outdoor religious services and ceremonies. This area, in front of the north wall, consists of a platform with an altar at the base. The Madonna statue is above and behind the altar. The crown, consisting of the imported bronze pinnacles, surmounts the tower directly above the Madonna. About 5 to 10 feet separate the head of the Madonna and the crown.

Beneath the plaza will be a large church for which a retaining wall has already been erected. This church will extend below both the tower and the plaza. When completed, it will be used for public religious services and devotions, and will be named the Madonna Queen Church.

During the trial, at plaintiff's request, and in the presence of counsel for the parties and their witnesses, the court viewed the statue in front of the Don Orione Rest Home prior to its transfer to the tower wall across the street. A photograph of the statue, with a large quantity of votive candles at its base, situated in front of the Don Orione Rest Home site, is reproduced as appendix "A."

From this examination of the site, the testimony, and the exhibits produced at trial, there is no doubt that the statue displayed before the Don Orione Rest Home was the object of special veneration. The special nature of the devotions conducted there had meaning only because of the existence of the statue of the Madonna, Queen of the Universe. That these devotions took place solely because of the presence of the statue is obvious because there was no parish or church which drew the faithful to that site, regularly and in large numbers. It was clearly the statue which not only inspired the devotions conducted there, but also was the object of the homage rendered by the votive candles and the prayers of the viewers.

The overwhelming and uncontradicted evidence reveals clearly that the statue conforms to the definition of the term "shrine," as used in the tariff laws of the United States. *Acme Marble & Granite Company* v. *United States*, 324 F. Supp. 503, 66 Cust. Ct. 172 (1971). In the *Acme* case, the question presented was whether a 10-foot high Carrara marble bas-relief plaque depicting the resurrection of Christ, and installed on the outside front wall of a mausoleum, was a "shrine" under paragraph 1774 of the Tariff Act of 1930, as amended, or marble wholly or partly manufactured as classified. The court held that the bas-relief was not a shrine for tariff purposes since it was not the object of special veneration. After an exhaustive review of the pertinent cases on the subject of shrines, the court stated:

> The record is clear that, apart from any funeral or commitment service held at the mausoleum in St. Mary Magdalen Cemetery,

> the plaque was neither the scene nor the object of any religious ceremony. * * *
>
> * * * Rather than the object of devotion for its own sake * * * the plaque was merely an aid in the solemnity or veneration inspired by the funeral or memorial mass. 324 F. Supp. at 510.

From a reexamination of those cases and the record here, the court concludes that the statue of the Madonna, Queen of the Universe, in its prior location at the Don Orione Rest Home, was a shrine for tariff purposes.

The uncontroverted statements of the witnesses and the exhibits show clearly that the statue was revered as a special object of veneration for more than 20 years. Since its arrival from Milan, Italy, in May 1954, a Marian year of the Roman Catholic Church, worshipers always burned candles and placed flowers before the Madonna statue. Together with daily pious devotions, this homage was uninterrupted, and a matter of common knowledge.

The statue of the Madonna did not merely inspire devotion, but was the very object of the devotion displayed before it. This is evident because there was no reason to light candles or conduct religious services and devotions outside the Don Orione Rest Home except for the existence or presence of the statue. The faithful came for no reason other than to view it, and pay special homage. It was not necessary that a mass, the highest form of worship in the Catholic liturgy, be conducted in order to inspire persons to pray before the statue. Indeed, on many occasions throngs joined in Marian processions honoring the Madonna Queen. In short, the Madonna statue had an individuality of its own, and was an object of special veneration and devotion.

Illustrative of this veneration is the "Annual Children's Sunday" at which occasion the children are placed at the feet of the Madonna, under whose patronage they receive a special blessing. A ceremony called "Blessing of the Sick" is also held annually before the Madonna who, it is believed by those present, "grants many spiritual graces to those who call on her for aid." As indicated by plaintiff's collective exhibit 7, worshipers have sent letters of thanksgiving and offerings "to the Madonna Queen" for favors received. The record compels the conclusion that the Madonna statue is a shrine in the tariff meaning of the term.

Plaintiff's claim, however, does not pertain to the classification of the Madonna statue, but rather to the pinnacles, which form its crown. Plaintiff contends that the crown constitutes an appurtenance or adjunct of a shrine. Although the court deems the statue to be a shrine, as it stood outside the Don Orione Rest Home, the crown did not come into being until after the statue was removed to the tower wall across the street from the home. The crown, therefore, could not be considered an appurtenance or adjunct of the Madonna shrine while the statue

remained at the home. It could only be an appurtenance or adjunct of the statue at the present location at the tower wall. Hence, further testimony was submitted at a continuance of the trial to assure that the statue would, in fact, be placed at the tower wall under the crown which already had been constructed. The court has duly noted the stipulation filed by the parties that the Madonna statue, in confirmation of that testimony, was enshrined during ceremonies in October 1977 at the tower wall of the building called the Madonna Queen National Shrine.

For the court to conclude, as plaintiff urges, that the crown is an appurtenance or adjunct of a shrine, it is necessary that the statue also be a shrine in its new setting or location. The testimony reveals that the Madonna statue required no particular setting for the homage it received. Thus, it would obviously require none in its new location, be it the building complex, the tower wall, or any other place at the Madonna Queen National Shrine. Its special relationship with the Don Orione Fathers for many years, however, explains its former and present settings. Nonetheless, as a shrine, with an individuality of its own, it requires no particular setting to be the object of devotion and veneration. The overwhelming history of devotion to the Madonna statue leads this court to conclude that the statue, on the former and present sites, constitutes a shrine within the tariff laws of the United States.

Plaintiff's collective exhibit 7 reveals that devotion and veneration to shrines in honor of the Blessed Mother is not new in America. It is evident that "a loyal and loving devotion to our Lady has been, from the very beginning, an important part of American Catholicism." It is also evident from the exhibits submitted at trial that the new setting, admittedly more dignified and attractive, may become one of the great Marian shrines in this country manifesting the special place that has been accorded the Madonna statue. Indeed, the parties agree that it is the focal point of the Madonna Queen National Shrine, not only because it is prominently displayed, but because of its special relationship to the entire building complex which bears its name. It is apparent from the exhibits that a grandiose complex was contemplated for many years in which the Madonna would be enthroned on a pedestal befitting her portrayal as a Queen. Reproduced as appendix "B" is a photograph of the pinnacles of the crown assembled together at the top of the tower, and, as appendix "C," a sketch of Pilgrims' Square with the Madonna statue enthroned in its tower.

At the Don Orione Rest Home, on a temporary basis, the Madonna statue rested on a wooden platform. However, it was always the intention to place the statue at the tower where a larger number of worshipers could continue the devotions. The move, therefore, was not only to fulfill the hopes and plans of those who conceived the

Madonna Queen National Shrine, but also an expression of devotion to Mary, the mother of Christ.

The crown, formed by the pinnacles, according to the plans for the tower and the testimony, is an essential part of the design. Atop the historical hill of East Boston, the statue is intended to be an exact replica, except for the crown, of the Madonna which stands on Monte Mario, the tallest hill of Rome. That statue was erected through the efforts of "The Friends of Don Orione," in thanksgiving for the sparing of Rome from the physical ravages of battle during World War II. With its unique background, as recited in plaintiff's exhibit 7, and the special treatment it has received since its arrival in the United States, it cannot be questioned that the Madonna statue is not an ordinary religious statue, but is unique among statues. Even before its exportation from Milan, Italy, the statue was the object of a spontaneous display of devotion which delayed its arrival in this country.

Defendant indicates that since devotions have not been shown to take place before the Madonna statue at its new location, the crown could not be an appurtenance or adjunct of the statue-shrine. In view of the record, however, it is impossible to conclude that the statue's transfer to the loftier position of the tower has changed its character in any way. From the testimony, and the physical inspection of both the old and new locations, the only inference that can be drawn is that the Madonna statue has been, and continues to be, a special object of devotion and veneration. Indeed, the very purpose of its transfer to a specially designed place on the facade of the tower was to elevate and exalt the statue as the focal point of the Madonna Queen National Shrine. In this even more suitable setting it was also possible to provide the statue with a crown which it did not have before.

In the tariff sense, it is the essence of a shrine that the article, in and of itself, inspire and be the cause of the devotion paid to it. Its classification as a shrine is not necessarily dependent on its location in relation to a building. It is the holding of the court, therefore, that the Madonna, Queen of the Universe statue is a shrine at the tower wall of the Madonna Queen National Shrine.

The defendant, however, has challenged the requirement that an article, to constitute a shrine within the meaning of the tariff laws, need only inspire or incite the veneration paid to it. It claims that size and location are also crucial to its classification.

As in the *Acme* case, the classification question presented is whether the importation constitutes a shrine not from an "ecclesiastical point of view, or from the personal point of view of one or more laymen, but rather whether * * * [it] is a shrine within the meaning of the tariff laws." The *Acme* case made it clear that the meaning of ecclesiastical terms should be ascertained no differently than other terms whether religious or secular. Furthermore, it is well established in customs law

that the common meaning of a term used in the tariff laws is a question of law to be determined by the court. See *Borneo Sumatra Trading Co., Inc.* v. *United States*, 311 F. Supp. 326, 329, 64 Cust. Ct. 185, 188 (1970).

In its search to ascertain congressional intent the court may rely not only upon expert testimony, but may also examine lexicographic and other standard authorities to aid in its formulation of a definition. The "New Catholic Encyclopedia" recognizes four types of shrines "according as they honor objects of our Lord's Passion, the Blessed Virgin Mary, the saints, or Catholic beliefs and devotions." It also states that "[t]he term shrine refers to a place, usually the object of pilgrimages, where a miraculous statue or picture or other holy object receives special veneration * * * ." "XIII New Catholic Encyclopedia," 181–82 (1967).

On the meaning of the term "shrine," the court heard the testimony of two members of the Roman Catholic clergy, one a witness for the plaintiff and one for the defendant. Father Rocco Crescenzi, the witness for the plaintiff, was ordained in 1943, and has been associated with the Don Orione Rest Home since 1949. From 1964 to 1970 he served as Provincial for the Don Orione Institutions, an assignment in which he supervised seven institutions, all of which were engaged in charitable works. His concept of a shrine is "more than a regular church. It is a place of devotion where people go more willingly for devotion."

Defendant's witness, Rev. Theodore M. Steeman, is an associate professor in the theology department of Boston College. He testified that a shrine may be understood in two senses. In its narrow sense, which he stated governs its true meaning, a shrine is "a smaller object, a kind of container or box that is used to conserve or exhibit relics and other religious objects for religious purposes." He defined shrines in the broader sense as consisting of "churches or even larger religious establishments that have a particular devotional purpose usually not linked to a parish, but that are justified, basically, in terms of the specificity of the devotion that is acted out in those places."

Reverend Steeman conceded that the Madonna Queen National Shrine, upon completion, would be a shrine in the broad sense of that term if devotions were shown to take place there. Nevertheless, he stated that the distinction between the broad and narrow concepts of the term "shrine" was important because, in his opinion, the tariff laws had adopted the narrow concept since the articles listed in item 850.70 of the tariff schedules are small and movable.

The defendant contends that there are three definitions of the term "shrine," at least two of which are possible within the meaning of item 850.70 TSUS. Relying on lexicographic authority, the testimony

of Reverend Steeman, and the doctrine of *noscitur a sociis*, the defendant favors an intermediate interpretation of the broad and narrow meanings. Thus, it suggests that a shrine is "an object that is considered sacred by a religious group and that serves as the focus of the performance of some ritual." In addition, defendant contends that the tariff laws require that it be a small object capable of placement within a building, since the term "shrines" is listed with small articles, i.e., altars, pulpits, baptismal fonts, all capable of placement within a building. For this interpretation, the defendant relies heavily on the doctrine of *noscitur a sociis* which teaches that one may ascertain the meaning of an ambiguous term by the meaning of the other terms with which it is associated. See *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, 435 F. 2d 1319 (1971).

The defendant also cites legislative history to support its contention that any article which cannot be placed within a building is ineligible for classification as a shrine. It maintains that since the House Committee on Ways and Means, as well as the Senate Finance Committee, used the word "article" throughout their reports, Congress could not have intended it to include a building complex or a locus within the provisions of item 850.70. Suffice it to say that the term "article," in the tariff schedule sense, simply means "importation" or "merchandise," and in no way resolves the classification question presented.

By including "shrines" in item 850.70 Congress sought to accord shrines the same duty-free treatment given altars, pulpits, communion tables, baptismal fonts, mosaics, and iconostases. It did not, in any way, specify or limit the number or kind of shrines just as it did not qualify altars, pulpits, communion tables, baptismal fonts, mosaics, or iconostases. As stated in *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, 470, T.D. 47464 (1935): "an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administrative practice to the contrary, and without proof of commercial designation, will include all forms of said article." It should also be noted that because "statuary" is included in item 850.70 does not mean that statues are excluded from the category of shrines. Clearly, not all statues are shrines, and many shrines are not statues.

What must be determined is whether the pinnacles, which constitute the crown of the Madonna statue, are "appurtenances or adjuncts" of a shrine. The common element for the classification of the articles enumerated in item 850.70 is that they are imported for the use of a religious institution. The statutory provision makes no reference to size or location. As for size, altars, pulpits, and baptismal fonts are almost always large items, while mosaics, iconostases, and statuary

may vary in size, as well as in location. Moreover, altars, pulpits and baptismal fonts are not necessarily movable, and, once in place, are usually fixed.

The term "shrines," therefore, in item 850.70, cannot be limited as to size, location, or even portability. The articles enumerated all share the common element of a religious or spiritual meaning. The court, therefore, does not agree with defendant's contention that an article, to fall within the ambit of item 850.70 of the tariff schedules, need necessarily be "small," or be located in any particular place.

A study of the cases examined in *Acme* indicates that neither size nor location was determinative in deciding whether the imported article was a shrine for tariff purposes. The case of *Patrick J. Temple* v. *United States*, 65 Treas. Dec. 1249, Abs. 26784 (1934), decided under paragraph 1774 of the Tariff Act of 1930, held that plaster-of-paris images of several saints, and a statue of the "Pietà," placed in the basement of a Catholic mission, were shrines because they inspired veneration, and were the objects of "special devotional services." In *C. Wildermann Co.* v. *United States*, 56 Treas. Dec. 572, T.D. 43713 (1929), Stations of the Cross were also held to be shrines under paragraph 1674 of the Tariff Act of 1922, although they were outdoors, and not physically present in a religious edifice.

A leading case is *Daprato Statuary Co.* v. *United States*, 16 Ct. Cust. Appls. 233, T.D. 42840 (1928), which dealt with paragraph 1674 of the Tariff Act of 1922, the predecessor provision to paragraph 1774 of the Tariff Act of 1930. The Court of Customs Appeals affirmed a holding of this court which held that a marble, mosaic floor of a church, upon which rested an altar and two shrines, was not part of an altar or "shrine." It defined the term "shrine" as signifying "either a chapel dedicated to some holy personage or a thing, receptacle, case, tomb, or altar made venerable by some historic event or sacred association." It also noted that "[a]ltars and shrines * * * have an individuality of their own * * *." 16 Ct. Cust. Appls. at 235.

Although the defendant concedes that the courts have broadened the definition of shrine since the *Daprato* case, it nevertheless cites that case for the proposition that Congress intended the terms "shrine" and "altar" to be used in a restricted and religious sense, and that it did not intend to exempt from duty churches, chapels or buildings dedicated to religious uses. The defendant also questions the extent to which Congress has ratified later decisions in which the courts have broadened the definition of shrines.

The present governing tariff provision is item 850.70 of the tariff schedules. The predecessor provision covering shrines, and parts of shrines, paragraph 1774 of the Tariff Act of 1930, was the subject of comment by the Court of Customs and Patent Appeals in *United States* v. *Greek Orthodox Church of Evangelismos*, 49 CCPA 35, C.A.D.

792 (1962). In that case, the appellate court affirmed this court's decision which held that an iconostasis, containing several panels of icons (holy pictures), was a shrine since the pictures were regarded as sacred and venerated. The following portion of the opinion of the Court of Customs and Patent Appeals is pertinent:

> Turning to the legislative history, the term in question appeared in the Tariff Act of 1922, paragraph 1674, and, at a time when that act was in force, in *C. Wildermann Co.* v. *United States*, 56 Treas. Dec. 572, T.D. 43713, the Customs Court said: "It appears that although a shrine was originally a tomb containing the bones of saints or other sacred person, the meaning of the word has, through the ages, been recognized by the lexicographers to have enlarged in scope so as to embrace a receptacle containing an object of religious veneration, such as a *niche for sacred images.*" [Italic supplied.] This decision was presumably known to Congress when it reenacted, as paragraph 1774 of the Act of 1930, the same language which had been construed by the Customs Court. The authorities are not entirely uniform upon the point, but this court has held that, although the reenactment of the statute after a judicial interpretation by a court which is not a court of last resort "may not be a controlling consideration, it is a matter we think proper to consider along with" other matters. *Oxford University Press, N.Y., Inc.* v. *United States*, 33 CCPA 11, 22, C.A.D. 309.
>
> Since the passage of the 1930 act, the Customs Court in a consistent series of decisions has construed the words "shrine or parts of shrines" broadly enough to cover the present case. * * * Even if there were no evidence afforded by the legislative history, we would hesitate to overrule a line of cases that has extended over 30 years though not the decisions of a court of last resort. 49 CCPA at 39.

The cases referred to by the Court of Customs and Patent Appeals in the *Greek Orthodox Church* case were reviewed by this court in the *Acme* case. The defendant, however, has neither discussed nor cited the *Acme* case which contains the more recent treatment by this court on the subject of shrines.

The cases relied upon by this court in *Acme* reveal that the courts have interpreted the term "shrine" liberally, following the policy articulated by the Supreme Court in *Benziger* v. *United States*, 192 U.S. 38 (1904), as to articles imported solely for religious purposes. In *Benziger*, the question presented was whether the omission from paragraph 638 of the Tariff Act of 1897 of the words "casts of marble, bronze, alabaster, or plaster of paris," which appeared in prior tariff acts, prevented the free entry of such casts as "casts of sculpture" under paragraph 649 of the 1897 act. After examining the various provisions in the tariff statutes from 1861 to 1897, as they pertained to casts of sculpture, the Supreme Court said:

> This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the

> true construction of the provision in question the courts should resolve the doubt in his favor. 192 U.S. at 55.

No opinion since *Acme* has been cited by the defendant in which this court, or the Court of Customs and Patent Appeals, has departed from the broadened interpretation given to the term "shrine." Thus, what was said by the Court of Customs and Patent Appeals in *United States* v. *Greek Orthodox Church of Evangelismos* as to the 1930 provision for shrines is equally true today as to item 850.70 of the tariff schedules.

It should be noted that in the cases reviewed in *Acme*, in which the articles were held not to be shrines or parts of shrines, the court was not concerned with whether they were located inside or outside a building, but rather, whether they were special objects of veneration. Indeed, the holding in *Acme*, that the marble bas-relief plaque installed in the outside wall of a mausoleum was not a shrine, was not based on the fact that the plaque was large and located outdoors. It was held not to be a shrine because it was not the object of special veneration. See also *Daprato Statuary Co.* v. *United States*, 16 Ct. Cust. Appls. 233, T.D. 42840 (1928) [mosaic floor of a church held not part of a shrine]; *Columbo Co.* v. *United States*, 71 Treas. Dec. 186, T.D. 48794 (1937) [mosaic of colored glass held not a shrine]; *Lea's* v. *United States*, 41 Cust. Ct. 4, C.D. 2012 (1958) [majolica tiles held not parts of shrines]; *Westfeldt Brothers* v. *United States*, 48 Cust. Ct. 125, C.D. 2323 (1962) [stained glass windows held not shrines]; *John Horvath Company* v. *United States*, 274 F. Supp. 986, 59 Cust. Ct. 397 (1967) [mysteries of the rosary plaques held not shrines].

The *Wildermann* case, 56 Treas. Dec. 572, T.D. 43713 (1929), an early case in which outdoor Stations of the Cross were held to be shrines, is still pertinent, and refutes the defendant's contention that a shrine must be located indoors:

> Congress in providing *eo nomine* for shrines in paragraph 1674 * * * [succeeded by paragraph 1774 of the Tariff Act of 1930 and item 850.70 of the tariff schedules] did not provide either expressly or by implication where such articles should be used, and under the rules of construction in cases of this kind all forms of the article mentioned in the paragraph of the law are included therein * * *. 56 Treas. Dec. at 575.

The defendant cannot restrict the fundamental principle of Customs law governing the interpretation of an *eo nomine* provision referred to in the quotation from *Wildermann*, namely, that "in cases of this kind all forms of the article mentioned in the paragraph of the law are included therein."

Notwithstanding the testimony on the various meanings of the term "shrine," the determination of what constitutes a shrine for tariff purposes is a question for the court to decide. Some of the testimony

of the defendant's witness is clearly contradictory of existing law. On the legal meaning of the term "shrine," it is unduly restrictive, and is of value only as to the etymological definition of the term. Indeed, under the restrictive meaning suggested by defendant, some of the articles or importations already held to be shrines by the courts would not qualify for duty-free entry pursuant to the tariff laws.

It is the determination of the court that the statue of the Madonna, Queen of the Universe, at the tower wall of the Madonna Queen National Shrine is a shrine for tariff purposes. The Madonna statue, as an outdoor statue-shrine, is no different than the outdoor Stations of the Cross shrine in the *Wildermann* case, and the Pietà statue in the *Temple* case. All share in common the essential element that they are special objects of veneration.

Although the transfer of the Madonna, Queen of the Universe statue did not change its character as a shrine, its removal to the tower is important on the question whether the pinnacles, placed over its head as a crown, are "appurtenances or adjuncts" of a shrine.

Item 850.70 of the tariff schedules expressly includes:

> * * * shrines * * * or parts, appurtenances, or adjuncts of any of the foregoing, whether to be physically joined thereto or not * * *.

Item 850.70 reflects an amendment made in 1962 to its predecessor provision, paragraph 1774 of the Tariff Act of 1930, by H.R. 4449, Public Law 87–604. Senate Report No. 1719, which accompanied H.R. 4449, makes the following explanation:

> The word "parts" contained in the present provisions of paragraph 1774 has been interpreted by the courts to refer to structural parts to be physically joined to the articles of which they are a part. Difficult interpretative questions have arisen in respect to present provisions in this respect. It is, of course, the intent of the Finance Committee in reporting this bill that general construction materials are not to be included, as the bill applies only to structural parts essential to the article in question.
>
> A second purpose of the bill is to provide that articles which are appurtenances or adjuncts of the named articles, as well as parts thereof, shall be accorded the free entry privilege *whether to be joined thereto or not*, when imported under the conditions specified. Thus, articles concerning which interpretative questions have arisen, such as baldachinos, reredoses, tabernacles, altar predellas, altar cloths, and altar candlesticks, which are not actually physically attached to, or are structural parts of altars, pulpits, communion tables, and other religious articles named in paragraph 1774, would be within the purview of the bill. Candles and similar items not specially prepared for use with altars, shrines, etc., and which find other uses, would not be included. [Italic added.]

It is clear from the statutory language that the articles, to qualify for the free-entry privilege, may be either parts, appurtenances, or

adjuncts of shrines. Hence, articles are embraced in tariff item 850.70 which includes shrines if they are "appurtenances or adjuncts" of shrines whether or not they are "parts." While plaintiff does not maintain that the pinnacles are parts of a shrine, it does contend that they are appurtenances or adjuncts of a shrine, namely, the Madonna, Queen of the Universe statue.

The following are the definitions of the terms "appurtenance," "appurtenances," "appurtenant," and "adjunct":

> Appurtenance: "That which belongs to something else; an adjunct; an appendage; * * *." "Black's Law Dictionary" 133 (revised fourth ed. 1968)
> Appurtenances: "Accessory objects used in any function * * *." "Webster's Third New International Dictionary" (1968)
> Appurtenant: "Belonging, appropriate, accessory * * *." "Webster's Third New International Dictionary" (1968)
> Adjunct: "Something joined or added to another thing but not essentially a part of it * * *." "Webster's Third New International Dictionary" (1968)

Thus, the terms "appurtenance" and "adjunct" appear to be synonymous, and describe articles which belong, pertain, or relate to another article.

While the imported pinnacles, in the form of a crown, are not joined physically to the Madonna, Queen of the Universe statue, there is an unquestioned belonging, pertinence, or relationship between the statue and the crown. A crown is the traditional headdress of a queen, and is the mark of a sovereign. The testimony, exhibits, and inspection reveal a physical, artistic, and symbolic relationship between crown and statue.

The 5 to 10 feet between the head of the statue and the crown neither affect the concept, nor detract from the aesthetic appeal of the crown. Though not physically joined to the statue, it is physically joined to the tower which conceptually and functionally serves as a throne for the statue. Nevertheless, item 850.70 expressly provides that apurtenances or adjuncts, as well as parts, need not be physically joined to the articles enumerated. On the particular record before the court the bronze pinnacles, which constitute the crown, are appurtenances or adjuncts of the shrine, the Madonna, Queen of the Universe statue.

In its brief, the defendant has also contended that the imported merchandise cannot be classified under item 850.70 as a part, appurtenance, or adjunct since the statue and the imported merchandise were "not positioned in any arguable contact with one another for over 5½ years after the importation of the 'crown.' " Defendant relies upon general interpretative rule 10(e)(ii) which states that:

> A tariff classification controlled by the actual use to which an imported article is put in the United States is satisfied only if

such use is intended at the time of importation, the article is so used, and proof thereof is furnished within 3 years after the date the article is entered.

Since item 850.70 is not "a tariff classification controlled by the actual use," defendant's contention is without merit. The articles imported, in order to qualify for duty-free status, must be "imported for the use of an institution organized and operated for religious purposes." That requirement, however, does not pertain to the actual use or purpose of the articles, but only as to the class or type of institution that may use the importation. Item 850.70 does not speak of use within the intendment of general interpretative rule 10(e)(ii), but simply enumerates certain articles. In the language of customs law, item 850.70 is an *eo nomine* provision, i.e., one which describes an article of merchandise by specific name, and is not a classification provision which depends on actual use. See, e.g., the *Wildermann* case, which stated categorically that Congress provided *eo nomine* for shrines. 56 Treas. Dec. at 575. The question is whether the pinnacles constitute "appurtenances or adjuncts" of any one of the articles named in that *eo nomine* provision.

On the particular facts presented, the imported merchandise, the bronze pinnacles which constitute the crown of the Madonna, Queen of the Universe statue, are appurtenances or adjuncts of a shrine, an article specifically enumerated in tariff item 850.70.

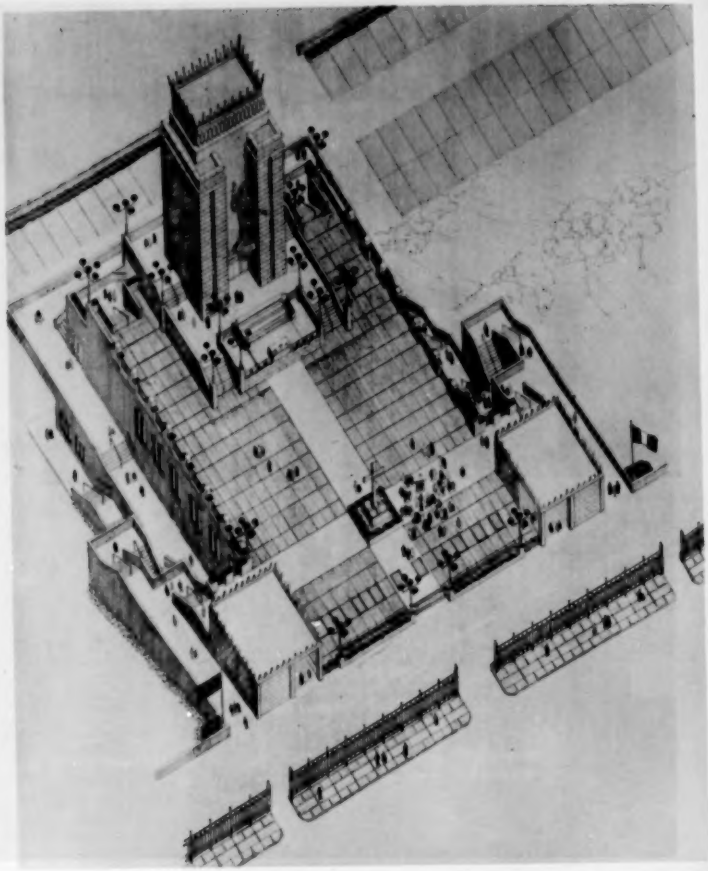
In view of the foregoing, it is the determination of the court that the imported bronze pinnacles are entitled to duty-free entry under item 850.70 of the Tariff Schedules of the United States.

Judgment will issue accordingly.

APPENDIX "A"

APPENDIX "B"

APPENDIX "C"



(C.D. 4800)

CONTINENTAL MANUFACTURING CO. ET AL. *v.* UNITED STATES

Trigger sprayers

Trigger sprayers claimed to be properly dutiable at 5 per centum ad valorem under item 662.50, TSUS, as modified by Presidential Proclamation 3822, T.D. 68–9, *held* properly subject to classification under item 662.35, TSUS, as modified, *supra*, as classified, as simple piston pump sprays.

The common meaning, in the absence of a commercial designation which differs from the common meaning, is controlling.

Common meaning of a tariff term is not a question of fact but a question of law to be determined by the courts. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *Productol Chemical Co.* v. *United States*, 74 Cust. Ct. 138, C.D. 4598 (1975).

Testimony of witnesses as to whether the sprayers are simple or complex is merely advisory and not binding on the court. *Tropical Craft Corp.* v. *United States*, 45 CCPA 59, C.A.D. 673 (1958).

Legislative history may not be utilized where the tariff term is plain and unambiguous. *C. J. Tower & Sons* v. *United States*, 41 CCPA 195, C.A.D. 550 (1954).

Court Nos. 74–2–00331, etc.

Port of Los Angeles

[Judgment for defendant.]

(Decided April 23, 1979)

Glad, Tuttle & White (*Edward N. Glad* and *T. Randolph Ferguson* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Bruce M. Mitchell*, trial attorney), for the defendant.

FORD, Judge: Plaintiffs in these actions joined for trial contest the classification and assessment of duty of six models of trigger sprayers designated as models 922–H, 922–HJ, 922–C, CTS–4700, 5980–05, and 923–H. The sprayers were classified by Customs under item 662.35 of the Tariff Schedules of the United States, as modified by Presidential Proclamation 3822, T.D. 68–9, which provides for simple piston pump sprays. Duty was assessed thereon at the rate of 9.5 per centum ad valorem. It is the contention of plaintiffs that the sprayers are not "simple" and are, therefore, properly subject to classification under item 662.50, as modified, *supra*, which prescribes duty at the rate of 5 per centum ad valorem.

The pertinent statutory provisions read as follows:

	Mechanical appliances, whether or not hand operated, for projecting, dispersing, or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam- or sand-blasting machines and similar jet projecting machines; all the foregoing (except automatic vending machines) and parts thereof:	
662.35	Simple piston pump sprays, powder bellows, all the foregoing and parts thereof	9.5% ad val.
662.50	Other	5% ad val.

The record consists of a stipulation of counsel for the parties that all models have the same mechanism as CTS–4700 and operate in the same manner. Plaintiffs offered the testimony of one witness and introduced 20 exhibits. Defendant's case in chief consisted of the testimony of two witnesses and the receipt in evidence of seven exhibits.

Defendant moved to dismiss and plaintiffs consented to said motion with respect to entry DE 133435 of court No. 74–2–00331, protest No. 2704–3–003104. Accordingly, said entry is severed and dismissed as to said protest. Defendant then moved to sever and dismiss entries DE 206593, DE 211408, DE 230539, DE 249341, and DE 252257 from protest No. 2704–4–000702 on the ground that said entries are also covered by protest No. 2704–4–000669 which is not before the court. Since only one protest may be filed against one category of merchandise covered by the same entry, the latter protest, 2704–4–000702 involved in this action is a nullity. Accordingly, court No. 75–1–00098 is hereby severed and dismissed as to entries DE 206593, DE 211408, DE 230539, DE 249341, and DE 252257 covered by protest No. 2704–4–000702.

The issue presented for determination is whether the trigger sprayers involved, which admittedly are piston pump sprays, are "simple" so as to bring them within the provisions of item 662.35, as modified, *supra*, or complex which would result in classification under item 662.50, as modified, *supra*.

The classification of the involved trigger sprayers is presumptively correct. The burden to prove otherwise rests upon the party challenging the classification. 28 U.S.C. 2635(a). Plaintiffs, in their attempt to overcome the presumption of correctness attaching to the classification, offered the testimony of Mr. Hiroshi Suzuki, executive vice president of a subsidiary of the plaintiffs. Mr. Suzuki described the operation and parts of the involved merchandise. The witness was of

the opinion that the sprayers were not simple piston pump sprays inasmuch as they contain a greater number of parts than those produced in the United States, have a unique one-line pump mechanism and children would find them difficult to operate.

Defendant, on the other hand, produced two expert witnesses who had engineering degrees, and were involved in the field of fluid mechanics. Dr. Julian Cole, a professor of engineering at UCLA, teaches fluid mechanics. Mr. James E. Burke is senior project engineer for Dispenser Products which is a subsidiary of the Ethyl Corp. Dispenser Products manufactures various dispensing systems including trigger pump sprays. Both witnesses considered the imported mechanism to be a simple pump spray similar to the type manufactured in the United States. Neither witness considered the number of parts utilized in the manufacture as determinative of whether the sprayers were simple or complex. In the opinion of the witnesses the determination of whether a mechanism is simple or complex is based upon the function of the article to obtain the end result. The fact the imported sprayers utilized a one-line system and those manufactured in the United States utilized a two-line system did not change their opinion. The only difference between the systems was the orientation of the valves. According to Mr. Burke and Dr. Cole, the imported merchandise is a simple piston pump spray. Dr. Cole considered the imported spray to be "the simplest kind of piston pump sprayer you could possibly make." The American sprayers, exhibits J and M, are in the opinion of defendant's witnesses simple piston pump sprays. The operation of the imported sprayers was described by Mr. Burke as follows:

> Basically, from the diagram, its got a first check valve or first valve back here (indicating), a second valve internally in there (indicating), a piston in between (indicating). As the trigger is squeezed (indicating), the first valve is sealing the compressed product in the compression chamber, and it has no place to go other than out past the second valve and out through the nozzle. And, on the return stroke, the second valve is closed. The first valve is opened up by the reduced pressure in the chamber and the air or product coming up through the dip tube into the chamber.

Since the statutory provision under which the merchandise was classified utilizes the language "Simple piston pump sprays," and neither party has alleged nor established a commercial designation which differs from the common meaning, the latter must be considered as controlling. The common meaning of a tariff term is not a question of fact but a question of law to be determined by the courts. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *Productol Chemical Co.* v. *United States*, 74 Cust. Ct. 138, C.D. 4598 (1975). Accordingly, testimony of witnesses as to whether the sprayers are simple or complex is merely advisory and not binding

upon the court. *Tropical Craft Corp.* v. *United States*, 45 CCPA 59, C.A.D. 673 (1958).

Plaintiffs' reliance upon *Emil Gebhardt* v. *United States*, 66 Treas. Dec. 983, Abs. 28998 (1934); *Same* v. *Same*, 56 Treas. Dec. 834, Abs. 9786 (1929); and *United Merchandising Corp. and Frank P. Dow Co., Inc.* v. *United States*, 42 Cust. Ct. 396, Abs. 63100 (1959) is misplaced since the statutory language herein, simple piston pump sprays, was not involved in any of those cases. The issue for determination therein was whether or not the operation of the involved merchandise constituted machines. Accordingly, the cases do not support plaintiffs' position nor are they controlling. *Brentwood Originals* v. *United States*, 73 Cust. Ct. 185, C.D. 4572 (1974).

It is also urged by plaintiffs that the court should, in determining the congressional intent, utilize the information contained in the Brussels Nomenclature. Where ambiguity exists the court may consider legislative history such as committee reports, debates, Brussels Nomenclature, etc. in order to determine congressional intent. *United States* v. *Kung Chen Fur Corporation*, 38 CCPA 107, C.A.D. 447 (1951). However, legislative history may not be resorted to when language of the statute is plain and unambiguous. *C. J. Tower & Sons* v. *United States*, 41 CCPA 195, C.A.D. 550 (1954). Based upon an examination of the merchandise and the testimony with respect to its operation, the court is of the opinion the involved merchandise falls within the classified language which is clear and unambiguous.

It follows, therefore, since plaintiffs have failed to establish *prima facie* that the sprayers are within the statutory language of item 662.50, as modified, supra, the action must be dismissed.

Judgment will be entered accordingly.

(C.D. 4801)

VOSS INTERNATIONAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-8-02154

[Judgment for defendant.]

(Decided May 7, 1979)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Branch Director; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Bruce M. Mitchell*, trial attorney), for the defendant.

MALETZ, Judge: In this case plaintiff challenges the amount of special dumping duties that were assessed against asbestos cement pipe which was exported from Japan on February 13, 1972, and en-

tered at the port of Los Angeles in March 1972.[1] The case arises as follows: Pursuant to the Secretary of the Treasury's finding of dumping, the Customs Service ascertained the foreign market value as defined in 19 U.S.C. 164 and the purchase price as defined in 19 U.S.C. 162, and assessed special dumping duties in an amount equal to the difference, as required by 19 U.S.C. 161.

Plaintiff does not question the "foreign market value" as determined by Customs or the use of "purchase price" for purpose of comparison with the "foreign market value." However, plaintiff claims that the "purchase price" utilized by Customs was not the proper "purchase price" as defined by 19 U.S.C. 162 which provides in part:

> For the purposes of sections 160 to 171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, * * *.

More particularly, in assessing the special dumping duties in question, Customs determined that the Japanese trading firm of Marubeni-Iida Co. Ltd. (Marubeni Japan) was the purchaser of the subject merchandise and that its wholly-owned subsidiary, Marubeni-Iida (America), Inc. (Marubeni America) was the person by whom or for whose account the merchandise was imported. On this basis, Customs concluded that the price paid by Marubeni Japan to the Japanese manufacturer of the merchandise, Kubota Iron & Machinery Works, Ltd. (Kubota) represented the "purchase price" as defined by 19 U.S.C. 162.

Plaintiff argues, however, that Marubeni Japan was related to the manufacturer, Kubota, and that Marubeni Japan acted as a selling agent for the manufacturer. In addition, plaintiff contends that it, Voss, is "the person by whom or for whose account the merchandise * * * [was] imported" so that the price paid by Voss is the "purchase price" which should bave been used in determining the dumping duties.

The facts are these: In the late 1950's, plaintiff Voss which had been importing pipe from Europe became aware of a demand for asbestos cement pipe which was used as a water pipe by west coast municipalities and land developers. This demand was occasioned by the fact that such pipe is inert to the high alkaline soil conditions in the desert and is, therefore, better suited than cast iron pressure pipe for transmission of water in desert areas.

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[1] Plaintiff's complaint in this case consists of two causes of action. In the first cause of action, plaintiff contended that the International Trade Commission's determination of injury was procedurally invalid. The court, however, held that the Commission's determination of injury was valid and entered summary judgment as to that cause of action. *Voss International Corp. v. United States*, 78 Cust. Ct. 130, C.D. 4606, 432 F. Supp. 205 (1977). Involved here is plaintiff's second cause of action.

In an effort to find a source for such asbestos cement pipe, Mr. Arthur H. Voss, the president of Voss, went to Japan and had a series of meetings with Kubota, a prominent Japanese pipe manufacturing concern, which represented that it could produce asbestos cement pipe to American standard specifications. These meetings culminated with an initial agreement on August 1, 1960, followed by subsequent agreements in 1966, 1968, and 1969, none of which are relevant to the present controversy.

This brings us to the agreement of January 22, 1971 which is directly relevant here since the purchase orders for the entries in question were made in that year. This agreement was in the form of a letter from Marubeni Japan to Voss which was confirmed by Voss and Kubota. At the outset, the letter states:

> We are pleased to confirm our agreement concerning our transaction of "KUBOTA" Asbestos Cement Pipe to be shipped during 1971, reached among Kubota, Ltd. as manufacturer, *Voss International Corp. as buyer and Marubeni-Iida Co., Ltd. as seller*, in the discussion held by the above parties on January 21, 1971 at Tokyo on terms and conditions set forth hereunder. [Emphasis added.]

The agreement then prescribes the specific dollar price for various diameters and class of pipe, FAS, Osaka; requires Voss to purchase approximately 18,000 tons of pipe during 1971; and sets forth size and length specifications.

The January 22, 1971 agreement between Voss and Marubeni Japan contained the following provision for payment:

> Payment by Voss International Corp. to Marubeni-Iida (America), Inc. for Kubota Asbestos Cement Pipe is made within 140 days after the date of Bill of Lading and the balance of draft payable to Marubeni is kept always within US$500,000.00 of credit limit. When the balance of draft reaches to this credit limit, Voss International Corp. will pay in cash the old outstanding drafts prior to the original due date to get the new shipment, so that the balance of draft payable can be always kept within the US$500,000.00 of credit limit. Further the above settlement of outstanding balance of draft is to be made before Voss receives the shipping documents of new shipment. For the above earlier payment, Marubeni agreed to give the discount to Voss International Corp. which is to be at an interest rate of prime rate plus 1.5% per annum.

The agreement further provided for a sales promotion fund, as follows:

> The sales promotion fund should be set up on the same arrangement as 1968 for the sales promotion expenses. Voss/Marubeni/Kubota agree that 90 cents per ton shall be contributed as follows:
>
> (a) One-third each by Voss/Marubeni/Kubota.

(b) The fund to be mutually administered and mutually managed by the designated representative of each party.

Finally, the agreement contained the below quoted provision for increased costs:

> The price payable by the Buyer to the Seller under this agreement shall be based upon present exchange parity rate of Japanese Yen Three Hundred Sixty to One U.S. Dollar. In case of any devaluation and/or revaluation of U.S. Dollar and/or Japanese Yen after the date of this agreement, the price shall be renegotiated among the concerned parties.

On September 7, 1971, Marubeni America and Voss reached a supplemental agreement with regard to the then existing floating or revaluation of Japanese yen. This agreement provided that the exchange loss due to yen fluctuation was for the buyer's, that is, Voss' account. The agreement further provided that for each transaction the difference in exchange rates between the time of negotiation of the shipping documents and the time before President Nixon's proclamation of August 15, 1971, would be borne by the buyer, that is, Voss, and that this difference would be paid by Voss to Marubeni America in cash at the exchange rate immediately after Voss received the invoice.[2] Finally, the agreement specified that it was to be applicabe to all the outstanding balances of specifically listed purchase ordelrs (which included the purchase orders here in issue).

Other facts of relevance in the case are these: The consumption entry prepared by Voss identifies Voss as the importer of record and as the person for whose account the merchandise was imported. Also, the record establishes that Voss paid the duties in question. On the other hand, the special Customs invoice filled out by Ma rubeni Japan identifies Marubeni America as the "purchaser" of theamerchandise. Further, the packing list also filled out by Marubeni Jkpan identifies Marubeni America as the party for whose account and ris the merchandise in question was sold. Additionally, Voss paid for the imported pipe in question by check made out to Marubeni America.

Finally, the clear weight of the evidence establishes (1) that Kubota and Marubeni Japan entered into a sales contract for exportation of cement asbestos pipe to the United States, with Kubota having no direct transactions with either Marubeni America or Voss; (2) that a contract is then concluded between Marubeni Japan and Voss for each calendar year; (3) that Kubota sells the subject merchandise to

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[2] On this aspect, the agreement stated:

For example: If the exchange rate which prevailed before [President] Nixon's proclamation was ¥357.- per U.S. Dollar and the rate at the time of document negotiations was ¥337.- per U.S. Dollar, the difference of ¥20.- per U.S. Dollar by the total invoice amount for the particular shipment will be the amount of exchange loss which will be paid in cash by the buyer. This loss amount will be converted into U.S. Dollars at the rate of ¥337.- per U.S. Dollar in this case.

Marubeni Japan on the basis of FAS, Osaka and Marubeni Japan generally pays Kubota 80 percent of the purchase price within 20 days after the date of the sales contract and pays the balance of 20 percent within 2 weeks after shipping; (4) that Kubota and Marubeni Japan negotiated on a "principal to principal" basis; and (5) that Marubeni Japan sells the subject merchandise to Voss on an FAS, Osaka, basis.

Based on the record, it is apparent that Marubeni Japan was not related to the manufacturer, Kubota, and that Marubeni Japan was not a selling agent for the manufacturer, as plaintiff contends. Rather, the record is clear that Kubota and Marubeni Japan negotiated on a principal to principal basis.

We consider next the question as to whether Marubeni America or Voss was the "person by whom or for whose account the merchandise * * * [was] imported." As to this, the court is quite mindful that in response to a questionnaire of the Customs Service, Marubeni Japan alleges that it sold the subject merchandise to Marubeni America which in turn sold it to Voss. And as previously noted, the special Customs invoice and the packing list both prepared by Marubeni Japan are to similar effect. However, little if any weight can be given to this evidence when it is considered that the basic agreement of January 22, 1971—which is the best evidence of the substance of the transaction between the parties—makes it clear that the relationship between Voss and Marubeni is that of buyer and seller.

In this connection, the Customs Service determined that Marubeni Japan was the *purchaser* of the subject merchandise and that its wholly-owned subsidiary, Marubeni America, was the *person* by whom or for whose account the merchandise was imported. And it is of course basic that these determinations enjoy the presumption of correctness. However, they are erroneous as a matter of law. For the determinations that Marubeni Japan was the *purchaser* and that Marubeni America was the *person* by whom or for whose account the merchandise was imported are directly contrary to 19 U.S.C. 162. That section, to repeat, provides that "the purchase price of imported merchandise shall be the price at which such merchandise has been purchased * * * by *the person* by whom or for whose account the merchandise is imported * * *." [Emphasis added.] Manifestly, the provision does not contemplate *two* persons or entities in its definition of "purchase price." Rather, the provision contemplates that the price that becomes the "purchase price" is the price at which *the person* by whom or for whose account the merchandise is imported agrees to purchase said merchandise. If Marubeni America is that person, as determined by Customs, it is simply not possible under the statutory scheme for Marubeni Japan to be the purchaser. Indeed, as the defendant itself states in its brief (p. 29): "*Realistically viewed,*

the transactions between Marubeni Japan and Marubeni America involved the movement of goods from one portion of the same corporate entity to another." [Emphasis added.]

The conclusion thus becomes inescapable that Marubeni Japan was the seller of the merchandise; that Voss was the person by whom the merchandise was imported; and that while Marubeni America was a corporate subsidiary of Marubeni Japan, it was in substance, insofar as the present transaction is concerned, simply one adjunct of the same Marubeni corporate entity. See *Mitsui & Co.* v. *United States*, 68 Cust. Ct. 266, 270, R.D. 11767 (1972).

But although Voss was the person by whom the merchandise was imported, this does not end the matter. For there remains the question as to whether or not Voss' price was a proper "purchase price" for purposes of 19 U.S.C. 162 which at the risk of further repetition provides that the purchase price "shall be the price at which such merchandise has been purchased or agreed to be purchased, *prior to the time of exportation* * * *." [Emphasis added.]

With respect to this question, plaintiff contends that the "purchase price" of the subject merchandise was that specified in the January 22, 1971 agreement between Voss and Marubeni Japan. However, I cannot agree since, as set out below, the record demonstrates that the price which Voss agreed to pay Marubeni for the merchandise was not actually established until February 18, 1972, 5 days after exportation.

At the outset, it is clear that the Antidumping Act envisions that a definite and determinable purchase price (whether actual or agreed) must exist prior to the date of exportation for comparison with the foreign market value—this in order to determine the margin of dumping. In this respect, Mr. Voss, the president of Voss, testified that at the time Voss confirmed the January 22, 1971 agreement with Marubeni Japan "[t]here was no way of knowing" exactly what the total amount for the imported merchandise would be. Under the terms of this agreement, the price payable by Voss to Marubeni was to be based upon the then exchange parity of 360 Japanese yen to 1 U.S. dollar. However, the agreement further provided that "[i]n case of any devaluation and/or revaluation of U.S. dollar and/or Japanese yen after the date of this agreement, the price shall be renegotiated among the concerned parties." Therefore, as of January 22, 1971, the prices set forth in the agreement of that date were subject to renegotiation in the event that the Japanese yen was devalued after the date of that agreement.

Thereafter, on September 7, 1971, Voss and Marubeni entered into a supplemental agreement concerning the effect of any revaluation of the yen. That agreement, as previously noted, provided that Voss would assume the loss due to yen fluctuation; and that Voss would pay to Marubeni "[t]he difference in exchange rates between the time of

negotiation of the shipping documents and the time before [President] Nixon's proclamation of August 15, 1971." Further, at trial, Mr. Voss acknowledged that pursuant to the supplemental September 7, 1971 agreement, the amount representing the loss due to currency fluctuation, which Voss had to bear, would be determined on the date that Voss received the shipping documents and that Voss would know the exact price it had to pay for the merchandise on that date. The record is uncontroverted that Voss received the shipping documents on *February 18, 1972*. Therefore, as Mr. Voss conceded at trial, at the time the merchandise was exported, that is, *February 13, 1972*, Voss did not know the exact amount it would have to pay for the merchandise. In deed, Mr. Voss testified that on or before February 13, 1972, the date of exportation, it was "impossible" to know the exact price for the merchandise.

In short, the September 7, 1971 supplemental agreement provided, in essence, that the actual price which Voss was required to pay would be determined by a condition subsequent, that is, the possible devaluation or revaluation of the Japanese yen. The date upon which the effect of currency fluctuation was to be determined was not set until the date of the negotiation of the shipping documents, which in this case was February 18, 1972. Therefore, as we have seen, the total, definite, and fixed price which Voss agreed to pay for the merchandise was not finally determined until February 18, 1972, 5 days after the date of exportation, February 13, 1972.

Stated otherwise, at the time of the original agreement, January 22, 1971, and at the time of the supplemental agreement, September 7. 1971, it was not only impossible to know what effect currency fluctuations would have on the ultimate purchase price but, also, whether there would be any effect at all. As previously observed, at the time the merchandise was exported, February 13, 1972, Voss did not know the exact amount it would have to pay for the merchandise. And the price which Voss eventually paid for the merchandise was not the price set forth in the January 22, 1971 agreement, because the value of the Japanese yen subsequently changed.

Accordingly, the price which Voss paid or agreed to pay Marubeni was not the "purchase price" for purposes of 19 U.S.C. 162, because it was not a price paid or agreed to be paid "prior to the date of exportation." The supplemental agreement between Voss and Marubeni regarding the loss due to currency fluctuation frustrates the intent of the Antidumping Act since it is an agreement to pay an amount to be determined after the date of exportation and thus may not form a basis for the determination of the "purchase price" as defined in 19 U.S.C. 162.

For the foregoing reasons, the action is hereby dismissed.

(C. D. 4802)

S.G.B. STEEL SCAFFOLDING & SHORING CO., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Shore frame systems

Court Nos. 72-2-00394 and 73-6-01355

SHORE FRAME SYSTEMS—STRUCTURES AND PARTS THEREOF

Shore frame systems and parts thereof comprising "scaffold-type shoring," used as a temporary support for concrete formwork and for other structural purposes, are classifiable as "other structures and parts of structures" within the purview of the superior heading to items 652.90–652.98, TSUS, and are properly dutiable under item 652.98, as claimed by plaintiff. Thus, the imports were improperly assessed duty under the "basket" provision for articles of iron or steel in item 657.20, TSUS, as classified by customs.

ANSWERS TO INTERROGATORIES—NOT OFFERED IN EVIDENCE

Rule 6.3(b) provides that "the answers [to interrogatories] may be used to the extent permitted by the rules of evidence." Hence, to be considered by the court, answers to interrogatories must be introduced into evidence and cannot merely be judicially noticed.

COMMERCIAL DESIGNATION—APPLICABLE WHERE TRADE UNDERSTANDING DIFFERS FROM COMMON MEANING

Implicit in the doctrine of "commercial designation" is the premise that the trade understanding of a tariff term differs from the common meaning, and therefore the doctrine has no application where the commercial and common meanings are the same.

SAME—TARIFF TERMS CARRY MEANING GIVEN THEM IN TRADE, WHICH PRESUMPTIVELY IS COMMON MEANING

It is basic that tariff terms presumably carry the meaning given them in trade and commerce. Further, it is well settled that the language of commerce is presumptively that language in common use; and in the interpretation of tariff laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that designation differs from the ordinary understanding of the word.

SAME—MEANING IN EFFECT AT DATE OF ENACTMENT OF TSUS

The commercial meaning of a tariff term is that meaning in effect at the time of the enactment of the Tariff Schedules.

SAME—QUESTION OF FACT—BURDEN OF PROOF—CONFLICT IN TESTIMONY

Proof of commercial designation is a question of fact to be established in each case. Since defendant posited that the commercial meaning of a tariff term differed from its common meaning, defendant had the burden of proof on that issue. Thus, defendant had the burden of establishing that, as used in the trade at the time of the enactment of the tariff schedules, the tariff term had a meaning

which was general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). Commercial designation is not established where there is a conflict in the testimony of the witnesses in the trade as to the commercial meaning of the tariff term in dispute.

SAME—TRADE DESIGNATION NOT CONFORMING TO GENERIC TARIFF DESCRIPTION

The fact that in the trade the merchandise is commercially known by a specific name which differs from a generic tariff description is not sufficient to exclude the merchandise from classification under the latter designation.

COMMON MEANING—ABSENCE OF COMMERCIAL DESIGNATION

In the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with the common meaning. A court, in determining common meaning, may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities. The court is not precluded from applying the common understanding of the term "structure" because the definitions of the term are imprecise.

SAME—"STRUCTURE"

Shore frame systems, which are "composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use" fall squarely within the meaning of "structure" as enunciated in *Simon, Buhler & Baumann (Inc.)* v. *United States*, 8 Ct. Cust. Appls. 273, T.D. 37537 (1918).

STATUTORY CONSTRUCTION—MASTER RULE

The master rule of statutory construction is to interpret the provision so as to carry out the legislative intent.

BRUSSELS NOMENCLATURE—AID TO INTERPRETING TSUS PROVISION WHERE THERE IS SIMILARITY OF LANGUAGE—STRUCTURES AND PARTS OF STRUCTURES

It is well settled that the Brussels nomenclature may properly be referred to "as an aid to interpreting" provisions of the TSUS where there is a "close similarity in the wording" of the two provisions. *United States* v. *Abbey Rents*, 66 CCPA—, n.5, C.A.D. 1213, 585 F. 2d 501 (1978). In light of the obviously similar phraseology in Brussels heading 73.21 and the superior heading to items 652.90–652.98, TSUS, affecting structures and parts of structures, and the fact that there was no specific provision for "structures and parts of structures" in the Tariff Act of 1930, it is beyond peradventure that the TSUS superior heading was derived from the Brussels nomenclature. Clearly, then, the Brussels nomenclature is part of the legislative history of the superior heading, and is a source for determining the intended scope of the term "structures" in that heading.

SAME—STRUCTURES—SCAFFOLD-TYPE SHORING

Since scaffolding is regarded as a "structure" under Brussels heading 73.21, it is reasonable to assume that "scaffold-type

shoring" was intended to be embraced by the corresponding provision for "structures" in the superior heading to item 652.98, TSUS.

EJUSDEM GENERIS

In essence, the *ejusdem generis* rule is applied where particular words of description are followed by general terms and the latter are regarded as referring to things of a like class with those particularly described. Whether or not the instant shore frame systems are *ejusdem generis* with the exemplars enumerated in the superior heading, the rule is inapplicable to determining the scope of the term 'structures" in the superior heading to items 652.90–652.98, TSUS, and each case depends upon its own record for determination. Were it necessary to resort to the *ejusdem generis* rule, it is apparent from the wide diversity of structures enumerated in the superior heading to items 652.90–652.98, TSUS (viz., hangars and other buildings, bridges, lock-gates, towers, and lattice masts), that the rule of *ejusdem generis* must be liberally applied and embraces the instant shore frame systems.

"STRUCTURES"—TERM NOT LIMITED TO ARTICLES PERMANENTLY AFFIXED

The term "structures" in the superior heading to items 652.90–652.98, TSUS, is not limited to articles permanently affixed.

TARIFF SCHEDULES—OBJECTIVE OF DRAFTERS TO RESTRICT SCOPE OF "BASKET" PROVISIONS

One of the major objectives of the drafters of the Tariff Schedules was to deemphasize the importance and restrict the scope of "basket" provisions. Consequently, adoption of defendant's narrow construction of the term "structures" in the superior heading to items 652.90–652.98, and thereby relegating classification of the merchandise to the "basket" provision for metal articles in item 657.20, TSUS, would serve to defeat a major objective of the tariff schedules.

[Judgment for plaintiff, except as to one entry.]

(Decided May 16, 1979)

Siegel, Mandell & Davidson, Esqs. (*Stephen M. Zelman*, *Herbert T. Posner* and *Allan H. Kamnitz*, Esqs., of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *Laura D. Millman* and *Sidney H. Kuflik*, trial attorneys, Esqs., for the defendant.

NEWMAN, Judge: This consolidated action is a sequel to *S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 70 Cust. Ct. 158, C.D. 4423, 361 F. Supp. 631 (1973), *aff'd*, 61 CCPA 73, C.A.D. 1123, 496 F. 2d 1224 (1974) (hereinafter *SGB I*). As in *SGB I*, the issue here pertains to the proper tariff classification for certain "shore frame systems" and parts thereof.

The within merchandise was imported by plaintiff from Great Britain during 1970 and 1971 and entered at the Port of New York. The regional commissioner of customs assessed duty at the rate of 13 or 11 per centum ad valorem, depending upon the dates of entry, under the "basket" provision for articles of iron or steel in item 657.20 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9. Plaintiff claims that the imports are classifiable as "other structures and parts of structures" within the purview of the superior heading to items 652.90–652.98, TSUS, and are properly dutiable at the rate of 9.5 per centum ad valorem under item 652.98.

I have concluded that plaintiff's claim should be sustained.

STATUTES INVOLVED

The pertinent provisions of the Tariff Schedules, as modified by Presidential Proclamation 3822 (T.D. 68–9), are:

Classified under:		
Schedule 6, Part 3, Subpart G:		
Subpart G.—Metal Products Not Specially Provided For		
Subpart G headnote:		
1. This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.		
* * * * * * *		
Articles of iron or steel, not coated or plated with precious metal:		
* * * * * * *		
Other articles		
* * * * * * *		
657.20	Other	13% [or] 11% ad val. [depending on the dates of entry]
Claimed under:		
Schedule 6, Part 3, Subpart F:		
Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:		
* * * * * * *		
652.98	Other	9.5% ad val.

ISSUE PRESENTED

Inasmuch as there is no dispute that the shore frame systems are "[a]rticles of iron or steel," as classified by the Government, the core issue herein, broadly stated, is whether the imports are more specifi-

cally described in the superior heading to items 652.90–652.98 as "other structures and parts of structures," as claimed by plaintiff.[1]

PRIOR PROCEEDINGS

In *SGB I*, the shore frame systems were classified as articles of iron or steel under item 657.20, TSUS, as modified, and claimed by plaintiff to be properly dutiable as jacks or lifting machinery or parts thereof under item 664.10, TSUS, as modified. In dismissing the action, the court held that a shore frame system is more than a jack or lifting machinery, and aptly referred to the merchandise as a "structure" or a part thereof. Thus, as the linchpin of his decision, Judge Rao stated (70 Cust. Ct. at 164–65):

> * * * The system, by means of stacking shore frames one on top of another, allows a *structure* to be built to any height required for supporting formwork in which concrete is poured, e.g., for floors, during the construction of a building. The jacks make necessary adjustments at the ground level and at the top but the system itself is more than a jack. It is construction equipment *consisting of a self-supporting temporary structure* having jacking devices to lift the heads to the proper height for holding the formwork. The other functions of the system, supporting and distributing the weight of the load, and resisting lateral forces, and its self-contained bracing which contributes stability and safety and enables a *temporary structure* of great height to be erected, are coequal with that of the jacks. * * * [Emphasis added.]

Continuing, the court also observed in *SGB I* (70 Cust. Ct. at 165):

> As in *Laurence Myers Scaffolding Co.* v. *United States*, *supra* [57 Cust. Ct. 333, C.D. 2809, 259 F. Supp. 874 (1966), *appeal dismissed*, 56 CCPA 133 (1967)], the court is not called upon to pass on the question of whether the instant shore-frame system constitutes "other structures" or "parts of structures" within the superior heading to items 652.90–652.98, dutiable under the catchall provision, item 652.98. *I note, however, that substantially similar language in heading 73.21 of the Brussels Nomenclature is intended to encompass adjustable or telescopic props and similar equipment for use in scaffolding.* (Explanatory notes, vol. 2, p. 674.) [Emphasis added.]

The present action initially came before me for decision on plaintiff's motion for summary judgment in accordance with rule 8.2. Defendant opposed the motion on the ground that there existed a material issue of fact that required resolution by a trial. In view of the existence of a genuine issue of fact concerning the commercial meaning of the term "structure" in the construction industry and the application of that term in its commercial sense to the shore frame systems, I denied plaintiff's motion. *S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 76 Cust. Ct. 274, C.R.D. 76–2 (1976).

[1] Under general interpretative rule 10(c), "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it * * *."

The Record

The record in this case comprises: The incorporated record in *SGB I;* the testimony of four witnesses on behalf of plaintiff and three witnesses on behalf of defendant; documentary exhibits; and the official entries and invoices (which were received without marking).

Plaintiff's witnesses were: Robert A. O'Callaghan, secretary-treasurer of S.G.B. Universal Builders Supply,[2] a distributor of scaffolding, shoring, and concrete formwork throughout the United States; Joseph M. Titunik, vice president of engineering for S.G.B. Universal and a licensed professional engineer; Robert M. Hiener, a civil engineer and chief engineer for General Reinsurance Corp.; and Charles W. Thurston, a licensed professional engineer and professor of architecture at Columbia University, who teaches various courses relating to structures.

Defendant called: Anthony V. Rizzi, a licensed professional engineer and president of Rissil Concrete, Inc., a concrete subcontractor specializing in the erection of reinforced concrete structures and concrete floors; Francis W. Meyer, a licensed professional engineer, chairman of the civil and architectural technology department at the State University of New York at Farmingdale, and a consultant in engineering for contractors; and William Eipel, a licensed professional engineer and president of Eipel Engineering, P.C.

The pertinent facts are:

The shore frame systems herein are the same as those involved in *SGB I*, and comprise a number of components fitted and used together for various supporting or load-bearing purposes. The principal components of the systems are two end frames (each consisting of two vertical parallel posts connected by three horizontal crossbars), cross bracing, and various attachments for height adjustment, stability, load distribution, and for holding the load superimposed on the systems. Additionally, there are connectors which permit the stacking of the shore frames. An assembled shore frame system, as illustrated in defendant's exhibit A, is shown below:[3]

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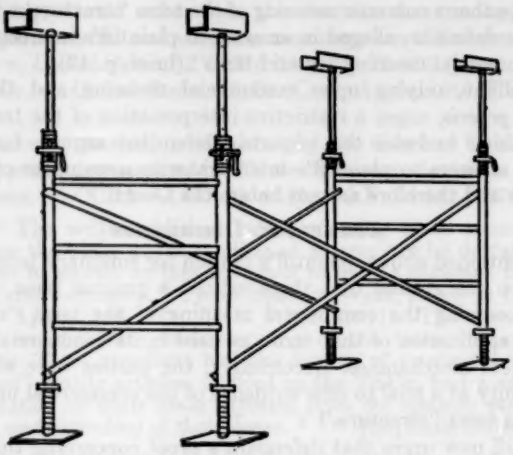
[2] This firm was created by a merger of S.G.B. Steel Scaffolding & Shoring Co., Inc., Universal Builders Supply and S.G.B. Epic (R. 8).

[3] The specific parts which are the subject of the complaint are: frames, cross braces, adjustable screws, U-heads, J-heads, plate heads and bases, nailing plates, staff attachments, adjustable base plates, connectors, screw jacks, and adjustable screw handles (complaint, par. 9).



The record establishes the following uses for the shore frame systems: Support formwork for concrete construction until the wet concrete hardens; temporary support for existing floors during alteration or repair; support for sidewalk bridges; support for protective canopies; support for plastic housing over a construction job for winter weather protection; support for temporary bridging between buildings for transportation of men and materials; scaffolding; and support of bins for grain silos and cement silos (R. 9, 15, 44, 57, 58–59, 61).

When the imports are used to shore concrete construction, the height of the system is adjustable to make it level. After the wet concrete hardens and becomes self-supporting, the shore frame system can be lowered so that the formwork into which the wet concrete was poured can be removed. The system is movable without disassembly by skidding or rolling, or it can be disassembled and moved to another floor of a building.

Further references to the record will be made *infra* in connection with a discussion of the parties' contentions.

Parties' Contentions

Plaintiff contends that, predicated upon the common meaning of the term "structure" (as indicated by definitions in various lexicographic authorities), the evidence of record, applicable judicial precedents, and Congressional intent (as evidenced by the "Explanatory Notes to the Brussels Nomenclature"), the shore frame systems are within the purview of the provision for "other structures and parts of structures" in the superior heading to items 652.90–652.98, TSUS. Plaintiff argues, moreover, that "defendant should be precluded from

proof of either a common meaning of the term 'structure' which varies from the definition alleged in answers to plaintiff's interrogatories, or of a commercial meaning for said term" (brief, p. 12).

Defendant, relying upon commercial meaning and the rule of *ejusdem generis*, urges a restrictive interpretation of the term "structure" which excludes the imports. Defendant argues, furthermore, that its answers to plaintiff's interrogatories were never offered into evidence and therefore are not before the Court.

Commercial Designation

As mentioned above, plaintiff's motion for summary judgment was denied on the ground that there existed a genuine issue of fact for trial concerning the commercial meaning of the term "structure," and the application of that term, as used in its commercial sense, to the subject merchandise. Accordingly, the parties were afforded an opportunity at a trial to offer evidence of the commercial understanding of the term "structure."

Plaintiff now urges that defendant's proof concerning the meaning of "structure" should be circumscribed by the definition of that term as set forth in answers to plaintiff's interrogatories. However, defendant's responses to plaintiff's interrogatories were not offered into evidence by plaintiff at the trial, and consequently as a procedural matter are not before the court. Rule 6.3(b) explicitly provides that "the answers [to interrogatories] may be used to the extent permitted by the rules of evidence." Hence, to be considered by the court, answers to interrogatories must be introduced into evidence and cannot merely be judicially noticed. *Bracey* v. *Grenoble*, 494 F. 2d 566, 570, n.7 (C.A. 3, 1974); *Heilig* v. *Studebaker Corp.*, 347 F. 2d 686, 689 (C.A. 10, 1965). See also Wright and Miller, "Federal Practice and Procedure," section 2180, p. 572 (1970).

We now turn to the Government's argument that "[t]he focus of the term structure must be viewed by its *commercial designation* or the interpretation commonly placed upon it by the particular industry involved"; and that "[o]nly in the absence of proof as to a *commercial designation* are tariff terms construed in accordance with a 'common meaning' which in any way differs from the way in which the term is used in commerce." (Emphasis added.) (Brief, pp. 27, 29.) [4]

Implicit in the doctrine of "commercial designation" is the premise that the trade understanding of the tariff term differs from the com-

[4] Defendant's posture concerning the issue of commercial meaning has been equivocal. Thus, at the trial, Government counsel stated that "there is *no commercial designation* but * * * there is a commercial context which is different from a common [meaning]" (R. 13). (Emphasis added.) Also, at trial, Government counsel contended that the "commercial context" of the term "structure" differed from the common meaning (R. 48). However, in its post-trial brief (at p. 27), defendant inconsistently argues: "It is plaintiff, *not defendant*, which is suggesting the possibility that the commercial meaning of the term in issue is basically different from its common meaning." (Emphasis added.)

mon meaning. Stated otherwise, the doctrine has no application where the commercial and common meanings are the same. *Stephen Rug Mills* v. *United States*, 32 CCPA 110, C.A.D. 293 (1944); *Draeger Shipping Co.* v. *United States*, 15 Ct. Cust. Appls. 190, T.D. 42234 (1927).

Hence, as very recently pointed out by the Court of Customs and Patent Appeals, *per curiam*, in *Excelsior Import Associates, Inc.* v. *United States*, 66 CCPA —, C.A.D. 1212, 583 F. 2d 513 (1978):

> * * * The well-established rule respecting trade sense is that "before the plain understanding of a term can be deviated from it must be shown by plenary proof to have a different import in trade and commerce." *United States* v. *Wells, Fargo & Co.*, 1 Ct. Cust. Appls. 158, 161, T.D. 31211 (1911). The Government relied on the plain understanding of the term "ornamented" articles. Thus, appellant had the burden of proving that "ornamented" textile articles, as used in the TSUS, had a *commercial designation or trade sense different from the common meaning or plain understanding of that phrase.* * * * [Emphasis added.]

In *Wells, Fargo*, cited *supra* in *Excelsior*, the Court of Customs Appeals further expounded upon statutory interpretation in accordance with commercial designation (1 Ct. Cust. Appls. at 161–62):

> It is a rule of statutory interpretation, confined not alone to the customs laws, but running through the universal scope of law, the "words and phrases are assumed to be used in their natural signification" and shall be so construed, the sole exception in customs adjudication being that commercial designation shall obtain over the common and accepted understanding of words where such is duly proven.* * *
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> * * * * * * *
>
> The legitimate corollary of this often-pronounced rule of interpretation is that no meaning shall be given a word or phrase used in customs laws other than its ordinary or accepted meaning *except upon plenary proof that this extraordinary meaning is fully and completely understood and accepted throughout the United States by all of those dealing wholesale in that class of goods.*
>
> The rule is based upon the sound principle that customs laws are drawn in view of the lay understanding (first) of the trade subject thereto, and (secondly) for the information of merchants and dealers who are not lawyers, and perchance may not be skilled in the finesse of the English language and who, with a common lay understanding, will be completely informed by the plain words of the statute as drawn by Congress what duties are levied and what penalties they may expect for a violation of the law. [Emphasis added.]

It is basic, of course, that tariff terms presumably carry the meaning given them in trade and commerce. *Ameliotex, Inc.* v. *United States*, 65 CCPA 22, C.A.D. 1200, 565 F. 2d 674 (1977); *Esco Manufac-*

turing Co., aka J. Hofert Co. v. *United States*, 63 CCPA 71, C.A.D. 1167, 530 F. 2d 949 (1976). Further, it is well settled by a long line of decisions that the language of commerce is presumptively that language in common use; and in the interpretation of tariff laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that designation differs from the ordinary understanding of the word. See for example, *Rosenblad Corp.* v. *United States*, 49 CCPA 81, C.A.D. 800 (1962); *United States* v. *C. J. Tower & Sons of Buffalo, N.Y.*, 48 CCPA 87, C.A.D. 770 (1961); *Floral Arts Studio et al.* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958); *United States* v. *The Specialty House, Inc., et al.*, 42 CCPA 136, C.A.D. 585 (1955); *United States* v. *E. Dillingham, Inc.*, 41 CCPA 221, C.A.D. 555 (1954); *C. J. Tower & Sons* v. *United States*, 41 CCPA 195, C.A.D. 550 (1954); *Hummel Chemical Co.* v. *United States*, 29 CCPA 178, C.A.D. 189 (1941); *United States* v. *M. J. Brandenstein & Co.*, 17 CCPA 480, T.D. 43941 (1930); *S & T Imports, Inc.* v. *United States*, 78 Cust. Ct. 45, C.D. 4690 (1977).

Since defendant posits that the commercial meaning of "structure" differs from its common meaning (R. 13, 48), defendant has the burden of proof on that issue. *United States, etc.* v. *Simon Saw & Steel Co.*, 51 CCPA 33, 38, C.A.D. 834 (1964); *The Specialty House, Inc.*, 42 CCPA at 141; *Heads and Threads, Division of MSL Industries, Inc.* v. *United States*, 60 Cust. Ct. 308, 313, C.D. 3374, 282 F. Supp. 484 (1968). Proof of commercial designation is a question of fact to be established in each case. *Tower & Sons* v. *United States*, 11 Ct. Cust. Appls. 261, T.D. 39080 (1922); *Florsheim Shoe Co., Division of Interco, Inc.* v. *United States*, 71 Cust. Ct. 187, C.D. 4495 (1973); *Daniel Green Shoe Co.* v. *United States, (Transworld Shoe Corp., Party in Interest)*, 58 Cust. Ct. 7, C.D. 2868, 262 F. Supp. 375 (1967). The commercial meaning of a term is that meaning in effect at the time of the enactment of the tariff schedules. *Cf. R. J. Saunders & Co., Inc.* v. *United States*, 49 CCPA 87, 89, C.A.D. 801 (1962); *The Hy-Glow Co. et al.* v. *United States*, 58 Cust. Ct. 481, 486, C.D. 3023 (1967).

Insofar as defendant claims a "commercial designation" for the term "structure," defendant had the burden of establishing that, as used in the trade at the time of the enactment of the Tariff Schedules, such term had a meaning which was general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). *Moscahlades Bros., Inc.* v. *United States*, 42 CCPA 78, 82, C.A.D. 575 (1954); *United States* v. *M. & D. Miller, Inc.*, 41 CCPA 226, 235, C.A.D. 556 (1954); *Nylos Trading Co.* v. *United States*, 37 CCPA 71, 73, C.A.D. 422 (1949); *Stephen Rug Mills*, 32 CCPA at 116. Thus, the doctrine of commercial designation

"was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928). See also, *United States* v. *Fung Chong Co.*, 34 CCPA 40, 42, C.A.D. 342 (1946).

In light of the foregoing legal principles, we now consider the evidence of record respecting the commercial meaning of the term "structure."

Defendant's first witness, Rizzi, testified that the term structure, "particularly with myself and people that I talk to in the [construction] industry," means "an assemblage of elements designed to take load and in addition provide space, protection from the elements, and habitation" (R. 104–5). He provided one example—a building (R. 105, 108). Hence, after defendant's counsel questioned Mr. Rizzi concerning hangars, buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars and posts, the witness testified (R. 108):

> Q. Are all these items that you have mentioned in answer to my question structures or parts of structures in the meaning of the construction industry? * * *—A. The *complete list* that you talked about, *generally the building is considered to be a structure.* * * * [Emphasis added.]

With respect to lattice masts, which are one of the statutory structures enumerated in the superior heading, Rizzi stated that they are "very often *similar* to a structure" (emphasis added). And further while on direct examination, Rizzi testified that a structure in general has a degree of permanence, he readily admitted on recross-examination that a Bailey bridge is regarded as a structure notwithstanding that it is "a combination of structural steel elements which can be assembled in the field," and that such bridge is not designed to be permanent, but rather is capable of being moved about quickly (R. 122–23).

On cross-examination, Mr. Rizzi's definition of "structure" included the element of "environmental control" (R. 118). However, with respect to bridges (a statutory structure), Rizzi conceded that such element was "very incidental at best" (R. 120). Finally, on cross-examination, the witness characterized a shore frame system as "a complex structure which has many redundancies which is very difficult to analyze analytically" (R. 121).

Defendant's second witness, Professor Meyer, defined the term "structure" as "materials used to encompass space for the public use," and stated that such meaning is a general architectural definition (R. 165). It is apparent from Meyer's testimony on cross-

examination that his concept of a "structure" like that of defendant's first witness, is limited to *buildings*. Thus, on cross-examination, Meyer testified (R. 175–76):

> Q. * * * When you are discussing structures you mean buildings, don't you?—A. Yes.
> Q. That's what you are limiting your testimony to, the fact that the imported merchandise depicted by Plaintiff's Exhibit 1 is clearly not a building?—A. Yes.
> Q. Therefore, in your opinion it is not a structure?—A. A building is a structure, yes. This [shore frame system] still is a piece of equipment that is used for manufacturing the building.

Upon prompting by Government counsel on redirect-examination concerning bridges, bridge sections, hangars, and towers, Professor Meyer admitted (with qualification) that they would also be "structures," stating (R. 183):

> A. Within my definition, materials made to protect the public, I would say generally, *from what you* [referring to Government counsel] *have said*, these would also be structures. [Emphasis added.]

Further, on cross-examination, Meyer agreed with the following definition of "falsework" set forth in a text entitled "Formwork for Concrete" by M. K. Hurd, at page 314 (plaintiff's exhibit 3):

> FALSEWORK—the temporary *structure* erected to support work in the process of construction. In discussion of concrete construction, the term may be used much the same as *formwork* to include *shores* or vertical posts, forms for beams or slabs, and lateral bracing. [R. 163.] [Emphasis added in part.]

Professor Meyer conceded that a shore frame system is encompassed by the foregoing definition of "falsework" (R. 164) which is, according to the definition, a "temporary structure."

When on cross-examination, Meyer was read the description of "Scaffold-Type Shoring" on page 183 of the Hurd text (plaintiff's exhibit 3–B) [5] and was presented with the illustrations of such shoring on page 68 of the text (plaintiff's exhibit 3–A), he admitted that the imports are similar to the scaffold-type shoring depicted on page 68 (R. 170–71).

Defendant's witness, Eipel, used the term "structure" as synonymous with "building" (R. 202), as did the other two Government witnesses; and testified that in the construction industry, shore frame systems are not considered as "structures" (R. 197, 220). Nevertheless, Eipel acknowledged that "falsework," as defined in plaintiff's exhibit 3–A, is a "temporary structure" (R. 200), and further

[5] This description reads as follows: "Scaffold-type shoring is generally assembled in tower structures consisting of a pair of prefabricated frames, plus the diagonal cross bracing required to make the tower. * * *" Obviously this description of scaffold-type shoring describes the instant shore frame systems.

conceded that there are many structures other than buildings (R. 213). Moreover, Eipel agreed with the expansive definitions of "structure" found on page 32 of the BOCA ("Building Officials & Code Administrators") building code (1970) and page 2–8 of the New York City Building Code (defendant's exhibit M) (R. 206, 208). The BOCA and New York City Building Code definitions of "structure" read:

> *The BOCA Basic Building Code/1970* (R. 206):
>
> *Structure:* An assembly of materials forming a construction for occupancy or use including among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences and display signs.
>
> *Building Code—Local Law No. 76 of The City of New York* (Effective December 6, 1968, as amended to August 1, 1970) (defendant's exhibit M):
>
> *Structure:* An assembly of materials forming a construction for occupancy or use, including among others: buildings, stadia, tents, reviewing stands, platforms, stagings, observation towers, radio towers, tanks, trestles, open sheds, coal pockets, shelters, fences, and display signs.

Plaintiff's witnesses Titunik and Hiener testified that, as used in the building trade or in an engineering sense, the term "structure" encompasses an assembly of components designed to support a load, and that the shore frame systems fall within that definition (R. 45, 48–49, 59–60), Plaintiff's witness, Professor Thurston, defined a structure as an assembly of elements that supports a load *or* provides shelter, and stated that the shore frame systems are "structures" within his definition (R. 76, 84).

I find that the testimony of defendant's witnesses respecting a commercial meaning for the term "structure" is replete with contradictions, inconsistencies, and ambiguities. Indeed, the pronounced differences in the definitions of the term "structure" offered by both plaintiff's and defendant's witnesses demonstrate that there was no definite, general, and uniform trade understanding of the term. *Cf. Bloomingdale Bros. et al.* v. *United States*, 8 Ct. Cust. Appls. 314, T.D. 37596 (1918). Fundamentally, a commercial designation is not established where there is a conflict in the testimony of the witnesses in the trade as to the commercial meaning of the tariff term in dispute. *Downing* v. *United States*, 1 Ct. Cust. Appls. 500, T.D. 31530 (1911); *United States* v. *Jackson*, 1 Ct. Cust. Appls. 25, T.D. 30849 (1910); *Daniel Green Shoe Co., supra; Florsheim Shoe Co., supra; Heads and Threads, supra.*

Mr. Rizzi, whose concept of a "structure" was limited to buildings, nevertheless characterized a shore frame system as a "complex structure" (R. 121). Although Professor Meyer's architectural definition of

"structure" was similarly limited to buildings, he nevertheless agreed with the definition of "falsework" in plaintiff's exhibit 3, and testified that the shore frame systems were encompassed by that definition. Significantly too, Meyer admitted that the shore frame systems were similar to the scaffold-type shoring depicted on page 68 of the Hurd text, which is described on page 183 of that text as *"tower structures consisting of a pair of prefabricated frames, plus the diagonal cross bracing required to make the tower"* (emphasis added). Finally, defendant's witness Eipel endorsed the expansive definitions of "structure" as set forth in the BOCA and New York City Building Codes.

In support of its position that the shore frame systems do not fall within the asserted commercial meaning of "structures," defendant stresses the facts that in the purchase orders submitted to plaintiff for the merchandise (viz, defendant's exhibit D), such merchandise was referred to as "equipment", and in the construction trade the imports were known as shores or shore frame systems rather than as "structures".

Plainly, the TSUS term "structures" is a generic description, and particular structures are ordered and invoiced by more specific trade designations. The fact that the merchandise is commercially known by a specific name (viz, shores or shore frame systems), which name differs from a generic tariff description (viz, "structures"), is not sufficient to exclude the merchandise from classification under the latter designation. Thus, in *Heads and Threads, supra*, Judge Maletz specifically addressed this very point (60 Cust. Ct. at 314):

> * * * Similarly, where a party seeks to establish that merchandise is not included within the commercial meaning of a tariff term, it is a requisite that his proof show first, that the term had a commercial meaning in the trade differing from its common meaning; second, what that commercial meaning was; and third, that that meaning did not include the merchandise in controversy. *Ibid. It is not sufficient to show that at or prior to the enactment of the tariff law, the merchandise was always known by a name other than the tariff term.* * * * [Emphasis added.]

Accordingly, the imports cannot be excluded from classification as structures simply by proof that they are commercially known as shore frame systems or by other specific trade designations. Cf. *United States* v. *Henry L. Exstein Co., Inc.*, 16 Ct. Cust. Appls. 328, T.D. 43079 (1928); *United States* v. *Frank*, 15 Ct. Cust. Appls. 97, T.D. 42184 (1927); *Great Western Mercantile Co. et al.* v. *United States*, 25 Cust. Ct. 126, 131, C.D. 1275 (1950); *J. F. Starkey & Co.* v. *United States*, 6 Cust. Ct. 118, C.D. 244 (1941).

In summary, I am clear that defendant has failed to sustain its burden of establishing its claimed commercial designation for the term "structure." Adverting to the oft-repeated phrase in *Jas. Akeroyd &*

Co., supra, 15 Ct. Cust. Appls. at 443, "Commercial designation is a thing often claimed in customs litigation and rarely established."

COMMON MEANING

As pointed out above, the fundamental inquiry in this case concerns the meaning of the term "structures" as used in the superior heading to items 652.90–652.93, TSUS.

In the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with its common meaning. A court, in determining common meaning, may rely upon its own understanding of terms used and may consult standard lexicographic and scientific authorities. *United States* v. *Corning Glass Works*, 66 CCPA—, C.A.D. 1216, 586 F. 2d 822 (1978); *Trans-Atlantic Co.* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973).

Although as acknowledged in my prior opinion (C.R.D. 76–2), there is no precise definition of the term "structure," it should be noted that the common meaning of tariff descriptions lacking precise definitions has frequently been applied by the courts. For example, in *United States* v. *Idl Mfg. & Sales Corp.*, 48 CCPA 17, C.A.D. 756 (1960), Judge Rich writing for the Court of Customs and Patent Appeals, recognized that the term "machine" does not have a precise definition, observing (at 23):

> The state of the case law leads us to but one conclusion. While many items have been held to be, or not to be, "machines," there is no "judicial determination" of what a machine is. *It remains simply a question of common meaning and each case must be decided on the basis of its own facts, technical and legislative.* [Emphasis added.]

Similarly, with respect to the term "structural shapes," as used in paragraph 312 of the Tariff Act of 1930,[6] our appellate court recognized that "[n]o precise definition, however, can be laid down to cover the term, each case depending on its own record for determination." *The Frost Railway Supply Co.* v. *United States*, 39 CCPA 90, 92–93, C.A.D. 469 (1951). Accord, *United States* v. *Humble Oil & Refining Co. et al.*, 46 CCPA 138, 140, C.A.D. 717 (1959); *United States* v. *The Winkler-Koch Engineering Co.*, 41 CCPA 121, 134, C.A.D. 540 (1953); *Universal Builders Supply Co., Inc.* v. *United States*, 48 Cust. Ct. 99, 104, C.D. 2319 (1962). Further, in *Winkler-Koch*, the Court of Customs and Patent Appeals pointed up (41 CCPA at 134):

> We think it would be impossible, under the phraseology adopted by the legislative branch of the Government in the Tariff Act of 1930, for the courts to lay down a rule and declare

[6] Prior to the tariff schedules, there was no tariff provision for "structures" per se.

that such rule settled the questions of what is and, therefore, what is not a structural shape within the meaning of paragraph 312, *supra*.

Simon, Buhler & Baumann (Inc.) v. *United States*, 8 Ct. Cust. Appls. 273, T.D. 37537 (1918) was the so-called pioneer case on the subject matter of "structural shapes."[7] In *Simon*, the ultimate issue—whether certain parts of a brewery mash filter were "structural shapes" under paragraph 104 of the Tariff Act of 1913—was approached by first determining whether the filter itself was a "structure." The *Simon* definition of the term "structure" was recently adverted to with approval in *United States* v. *Paul M. W. Bruckmann*, 65 CCPA 90, 93, C.A.D. 1211, 582 F. 2d 622 (1978), wherein Judge Baldwin commented:

> * * * A complete definition of "structural" or "structure" is not to be found. An adequate point of departure is found in *Simon, Buhler & Baumann (Inc.)* v. *United States*, 8 Ct. Cust. Appls. 273, 276, T.D. 37537 (1918), as follows:
>
> > Ordinarily speaking, "structure" carries with it the idea of size, weight, and strength, and it has come to mean anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use.
>
> In *United States* v. *Humble Oil & Refining Co., et al.*, 46 CCPA 138, 140, C.A.D. 717 (1959), we indicated "that the word 'structures,' is not limited to such erections as buildings, bridges, and edifices." In *Laurence Myers Scaffolding Co.* v. *United States*, 57 Cust. Ct. 333, 339, C.D. 2809, 259 F. Supp. 874, 879 (1966), "bridge overhang shores, highway shores, and building shores" were all found to serve a purpose similar to the articles mentioned in the TSUS item. Therefore, bridges and highways are considered to be statutory "structures." In *J. Ray McDermott & Co.* v. *United States*, 69 Cust. Ct. 197, C.D. 4394, 354 F. Supp. 280 (1972), an offshore oil well drilling platform was found to be a "structure."

In addition to the *Simon* definition of "structure," plaintiff cites the following definitions as an aid to the Court in determining the common meaning of the term:

> 1. Sutherland and Bowman, *"Structural Theory,"* (3d ed. 1942), page 3:
>
> > A framed structure is an assembly of structural members arranged to carry the given load.
>
> 2. "Van Nostrand's Scientific Encyclopedia" (3d ed. 1958), page 1604:
>
> > The grouping of the various parts of an assembled entity, and the points at which, or the means by which, they are held together.

---

[7] See *United States* v. *The Winkler-Koch Engineering Co.*, 41 CCPA 121, 127, C.A.D. 540 (1953).

3. "The American Heritage Dictionary of the English Language" (1970), page 1278:

1. A complex entity. 2.a. The configuration of elements, parts, or constituents in such an entity * * *.

4. "Black's Law Dictionary" (4th ed. 1951), page 1952:

Any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner.

5. "The American College Dictionary" (1962), page 1200:

Anything composed of parts arranged together in some way * * *.

6. "Webster's Third New International Dictionary of the English Language Unabridged" (1971), page 2267:

2(b). something made up of more or less interdependent elements or parts; something having a definite or fixed pattern of organization.

The testimony offered by plaintiff accentuates the capacity of the shore frame systems to support heavy loads. Plainly, then, the shore frame systems, which are "composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use," fall squarely within the meaning of "structure" as enunciated in *Simon*. Additionally, all the lexicographic definitions of "structure" cited by plaintiff encompass the shore frame systems. Consequently, there can be no doubt that the merchandise falls within the common understanding of the term "structure."

Brussels Nomenclature

In addition to its reliance upon common meaning and judicial precedent, plaintiff cites the Brussels nomenclature as an indicium of legislative intent respecting the scope of the term "structures" in the superior heading to items 652.90–652.98, TSUS.

The master rule of statutory construction, of course, is to interpret the provision so as to carry out the legislative intent. *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 542 (1940); *United States, etc.* v. *Simon Saw & Steel Co.*, 51 CCPA 33, at 40. It is well settled that the Brussels nomenclature may properly be referred to "as an aid to interpreting" provisions of the TSUS where there is a "close similarity in the wording" of the two provisions. *United States* v. *Abbey Rents*, 66 CCPA—, n.5, C.A.D. 1213, 585 F. 2d 501 (1978).[8] See also Sturm, "A Manual of Customs Law" (1974), pages 150–51, 195–96, and 1976 supplement at page 48.

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[8] The U.S. Tariff Commission acknowledged that the Brussels nomenclature had great influence in the preparation of the tariff schedules. "Tariff Classification Study Submitting Report," at p. 8 (1960). See also: *Mattel, Inc.* v. *United States*, 65 Cust. Ct. 616, 625–27, C.D. 4147 (1970); *W. R. Filbin & Co., Inc.* v. *United States*, 63 Cust. Ct. 200, 208–10, C.D. 3897, 306 F. Supp. 440 (1969).

The language contained in the superior heading to items 652.90–652.98, TSUS, and in heading 73.21 of the Brussels nomenclature is:

Superior Heading, Items *652.90–652.98, TSUS*	Heading 73.21, *Brussels Nomenclature*
Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars and posts, and other structures and parts of structures, all the foregoing, of base metal:	*Structures*, complete or incomplete, whether or not assembled, *and parts of structures*, (for example, *hangars and other buildings, bridges and bridge-sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, pillars and columns*), *of iron or steel*; plates, strip, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel. [Emphasis added.]

As was previously mentioned, the court noted in *SGB I* that heading 73.21 of the Brussels nomenclature and the superior heading to items 652.90–652.98, TSUS, utilize "substantially similar language." Conceding that "it is apparent that the 'structures' and certain 'parts of structures' provisions in the TSUS were substantially derived from the Brussels nomenclature," defendant nonetheless insists that "the two provisions in question were not intended to be coextensive in coverage, and the differences in the two provisions are critical when applied to shore frame systems * * *" (brief, at 41–42). I disagree.

In light of the obviously similar phraseology in Brussels heading 73.21 and the superior heading to items 652.90–652.98, TSUS, affecting structures and parts of structures, and the fact that there was no specific provision for "structures and parts of structures" in the Tariff Act of 1930, it is beyond peradventure that the TSUS superior heading was derived from the Brussels nomenclature. Clearly, then, the Brussels nomenclature is part of the legislative history of the superior heading, and is a source for determining the intended scope of the term "structures" in that heading.

The court also noted in *SGB I* (70 Cust. Ct. at 165) that "substantially similar language [to the superior heading] in heading 73.21 of the Brussels nomenclature is intended to encompass adjustable or telescopic props and similar equipment for use in scaffolding." (Explanatory notes, vol. 2, p. 674.) Since scaffolding is regarded as a "structure" under Brussels heading 73.21,[9] it is certainly reasonable

[9] Scaffolding is commonly regarded as a "structure." For example, "The Random House Dictionary of the English Language" (unabridged ed. 1969) defines the term "scaffold" as: "A temporary structure for holding workmen and materials during the erection, repair, or decoration of a building." Additionally, the New York State Industrial Code rule for "Protection in Construction, Demolition and Excavation operations" (12 NYCRR 23) (defendant's exhibit G) defines the term "scaffold" as: "A temporary elevated working platform and its supporting structure including all components."

to assume that "scaffold-type shoring," such as that involved here, was intended by the drafters of the tariff schedules to be embraced by the corresponding provision for "structures" in the superior heading to item 652.98, TSUS. Cf. *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 187, 192, C.D. 3895, 305 F. Supp. 921 (1969).

As previously mentioned, defendant's witness Meyer admitted on cross-examination that the imports are similar to the scaffold-type shoring depicted on page 68 of the Hurd text, "Formwork for Concrete" (plaintiff's exhibit 3–A) (R. 170–71). More, "shoring," as defined in defendant's exhibit I (Hurd text, p. 315) includes "scaffold-type frames" (R. 154); and conversely, "scaffolding" may be used as shoring for concrete forms. Encyclopaedia Britannica ((1970), vol. 19, p. 1132). Finally, the record shows that the shore frame systems, in addition to their use for supporting concrete formwork, were used as scaffolding to support men and materials (R. 9, 58–59).[10]

In short, the instant merchandise is classifiable under the provision for "structures * * * and parts of structures" in heading 73.21 of the Brussels nomenclature, and accordingly falls within the intended scope of the identical language in the superior heading to item 652.98, TSUS.

Ejusdem Generis

We now consider defendant's argument that the legislative intent respecting the scope of the term "structures" is in doubt, and therefore it is necessary to resort to the rule of *ejusdem generis*.

In essence, the *ejusdem generis* rule is applied where particular words of description are followed by general terms, and the latter are regarded as referring to things of a like class with those particularly described. And in *Sandoz Chemical Works, Inc.* v. *United States*, 50 CCPA 31, 35, C.A.D. 815 (1963), the Court of Customs and Patent Appeals, per Judge Almond, said:

> *Ejusdem generis* is a rule of construction invoked, where legislative intention is in doubt or beclouded by ambiguity, as an aid in ascertaining the intention of the legislature. *It is not invoked to narrow, limit or circumscribe an enactment and never invoked if the intention of the legislature can be ascertained without resort thereto.* [Emphasis added.]

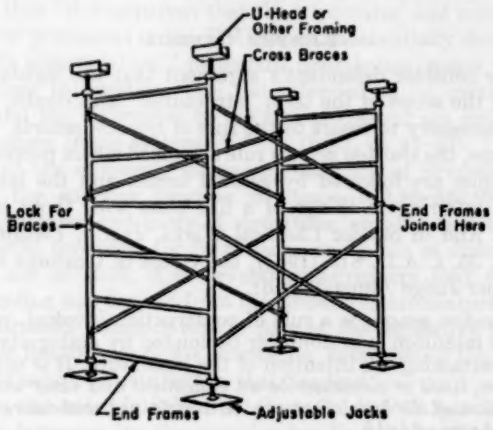
The thrust of defendant's argument is that the shore frame systems are not *ejusdem generis* with the exemplar structures in the superior heading because the systems are not permanently affixed, but rather are used as construction equipment for the temporary support of concrete formwork. Additionally, defendant cites many of the differences

[10] Plaintiff's witness Heiner testified that "there is probably more of this [shore frame system] used to support men and materials than there is for forms" (R. 66). However, its witness O'Callaghan stated that the primary use of the merchandise was to support concrete (R. 16).

in physical characteristics and design features between buildings and the shore frame systems.

Were it necessary to resort to the rule of *ejusdem generis* in this case (and I conclude that it is not), it is apparent from the wide diversity of structures enumerated in the statute (viz, hangars and other buildings, bridges, lock-gates, towers, and lattice masts) that the rule must be liberally applied and embraces the instant merchandise. Cf. *United States* v. *S. P. Skinner Co., Inc.*, 46 CCPA 105, C.A.D. 708 (1959); *Seprol, Inc., et al.* v. *United States*, 48 Cust. Ct. 480, Abs. 66856 (1962). Also cf. *United States* v. *C. J. Tower & Sons*, 44 CCPA 1, C.A.D. 626 (1956); *Norman G. Jensen, Inc.* v. *United States*, 47 Cust. Ct. 149, C.D. 2295 (1961).

Moreover, it should be noted that "towers" are one of the exemplars specifically named in the statute. As stated in plaintiff's exhibit 3–B, "[s]caffold-type shoring is generally assembled in *tower structures* consisting of a pair of prefabricated frames, plus the diagonal cross bracing required to make the *tower*." (Emphasis added.) Plaintiff's exhibit 3–A, depicts a "typical shoring 'tower'" (illustration 4–58):



As we have seen, defendant's witness Meyer admitted that the imports are similar to the scaffold-type shoring towers depicted above. In view of the foregoing admission, there is no merit in defendant's contention that the shore frame systems are not *ejusdem generis* with the exemplar structures in the superior heading (which includes towers).

But whether or not the merchandise is *ejusdem generis* with the exemplars enumerated in the statute, I find the rule inapplicable here.

In *United States* v. *The Winkler-Koch Engineering Co.*, *supra*, the question presented was whether certain oil well casings were "structural shapes" within the purview of paragraph 312 of the Tariff Act of 1930. The Government argued that the rule of *ejusdem generis* was applicable to the designation in paragraph 312, namely, "all other structural shapes of iron or steel," and that the oil well casings were not of the same general class as the articles named in the paragraph.

In rejecting the Government's narrow interpretation of the language "other structural shapes," predicated upon the *ejusdem generis* rule, our appellate court articulated the following rationale (41 CCPA at 134):

> * * * Conceding, without holding, that the casings here involved are not *ejusdem generis* with "beams, girders, joists, angles, channels, car-truck channels, tees, columns, and posts, or parts or sections of columns and posts, and deck and bulb beams," all of which are embraced within the term "structural shapes," we may not overlook the fact that Congress realized that there were and are "other structural shapes" of iron and steel and that it made provision for them. We do not have to go outside the paragraph to ascertain that "other structural shapes" are as fully provided for in paragraph 312 of the Tariff Act of 1930 as are beams, girders, or any other of the several articles designated *eo nomine* therein, but it is frequently more difficult to determine what constitutes a structural shape than it is to determine what constitutes a girder or a tee. The courts have fully recognized this in decisions from which quotations have been made herein, the latest being from *The Frost Railway Supply Co.* case, *supra*, where we said, "*No precise definition, * * * can be laid down to cover the term* [structural shapes], *each case depending on its own record for determination.*" [Emphasis in original.]

The teaching of *Winkler-Koch*, therefore, is that under paragraph 312 an article was not excluded from classification under the catch-all language "other structural shapes" by reason of the rule of *ejusdem generis*, and "*each case depend*[*ed*] *on its own record for determination.*" See also *United States* v. *Humble Oil & Refining Co.*, *supra*, wherein the Court of Customs and Patent Appeals applied much the same rationale. Although the TSUS provision here under consideration is "other structures" rather than "other structural shapes," as in paragraph 312, the court's approach in *Winkler-Koch* eschewing the rule of *ejusdem generis* is fully apposite in the present case.

I find defendant's argument that a "structure" includes only articles permanently affixed to be unpersuasive. It must be recognized that a criterion of permanence was consistently rejected under the provision for structural shapes in prior tariff acts. *Rex-Spannal, Inc.* v. *United States*, 60 Cust. Ct. 141, C.D. 3291 (1968) (shores); *Universal Builders Supply Co., Inc.* v. *United States*, *supra* (lattice form supports and

solid form supports used in concrete construction). See also *United States* v. *Frank*, 15 Ct. Cust. Appls. 97, T.D. 42184 (1927), wherein the court held that steel sheet piling used in concrete construction was classifiable as structural shapes even though at times its use was of a temporary nature. Similarly, a criterion of permanence is inapplicable here respecting the provision for "structures" in the TSUS.[11]

Parenthetically, there is a further reason which warrants rejection of defendant's narrow interpretation of the term "structures." One of the major objectives of the drafters of the tariff schedules was to deemphasize the importance and restrict the scope of "basket" provisions. "Tariff Classification Study Submitting Report" (1960), part II(E)(4), at 15–16; *United States* v. *A. Johnson & Co., Inc.*, 66 CCPA—, C.A.D. 1218, 588 F. 2d 297 (1978); *American Express Co.* v. *United States*, 61 Cust. Ct. 208, 213, C.D. 3573, 290 F. Supp. 778 (1968), *aff'd*, 57 CCPA 100, C.A.D. 985, 426 F. 2d 383 (1970). If we were to adopt the construction advanced by defendant, the classification of the merchandise would, of course, be relegated to item 657.20, the basket provision in schedule 6 of the tariff schedules for metal articles. Consequently, adoption of defendant's highly restrictive interpretation of the term "structures" would serve to defeat a major objective of the tariff schedules.[12]

Conclusion

For all the reasons stated herein, and under all the facts and circumstances, plaintiff's claim that the shore frame systems and parts thereof are properly dutiable under item 652.98, TSUS, is sustained, except with respect to the merchandise covered by entry No. 508229. The protest covering that entry (protest No. 1001–1–020722 in court No. 72–2–00394) is untimely under 19 U.S.C. 1514(b), having been filed more than 90 days after liquidation of the entry. Accordingly, this consolidated action is dismissed *sua sponte* for lack of jurisdiction only as to entry No. 508229. Judgment will be entered accordingly.

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[11] Interestingly, the Customs Service has ruled that a temporary warehouse is classifiable under the provision for "Other structures and parts of structures" in item 652.98, TSUS. 4 Cust. Bull. 118, T.D. 70-54(12) (1970).

[12] The predecessor to item 657.20, TSUS, was par. 397 of the Tariff Act of 1930. As significantly pointed out recently by Judge Rich in *A. Johnson & Co., Inc.*, *supra*, par. 397 "had come to incorporate such a hodgepodge of tariff classifications that it took no less than 219 separate TSUS item descriptions to sort them out." 66 CCPA at—, n.8.

(C.D. 4803)

B. & K. INSTRUMENTS, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.	Court Nos. R65/25188, etc.

Instruments and parts

Certain sound level meters and octave filter sets were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended, predicated upon the Customs' finding that the articles came within the final list designation "Instruments and parts, laboratory, sound measuring."

Plaintiff claims the merchandise does not come within the purview of the final list designation and should be appraised on the basis of export value, as defined in section 402(b), Tariff Act of 1930, as amended.

The term "laboratory instruments" has been construed as implying use for laboratory purposes, meaning use for experiment or study. *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1951), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973).

Plaintiff has failed to discharge its burden of establishing the imported instruments are of a class or kind which are not chiefly used for laboratory purposes.

[Judgment for defendant.]

(Decided May 22, 1979)

Allerton deC. Tompkins for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *John J. Mahon*, trial attorney), for the defendant.

FORD, Judge: The articles involved in these five consolidated appeals for reappraisement consist of instruments and parts invoiced as models 2203 and 2204 sound level meters and model 1613 octave filter sets, which were appraised on the basis of foreign value [1] as defined in section 402a(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165. The basis of appraisement was predicated upon a finding by Customs that the articles

[1] Section 402a(c), as amended, provides:

(c) FOREIGN VALUE.—The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

came within the designation "Instruments and parts, laboratory, sound measuring," which appears on the final list of articles issued by the Secretary of the Treasury and published in 93 Treas. Dec. 14, T.D. 54521, covering articles to be appraised under section 402a, Tariff Act of 1930, as amended, *supra*. The appraised values were found to be the invoiced unit prices, net, packed, plus 29.03 percent. B. & K. Instruments, Inc., the plaintiff-importer of record, and the exporter, Bruel & Kjaer, were at the time of exportation related persons within the meaning of section 402(g) of the Tariff Act of 1930, as amended, *supra*.

The court has before it for determination the issue of whether the importations are laboratory instruments, or parts thereof, within the meaning of the final list. Plaintiff has conceded they are sound measuring instruments or parts thereof.

Plaintiff contends the importations are not on the final list inasmuch as they are not laboratory instruments and parts, and therefore the proper basis of appraisement is export value as defined in section 402(b),[2] Tariff Act of 1930, as amended, *supra*, which values are represented by the invoiced unit prices, net, packed, less the 29.03 percent addition.

At trial the parties stipulated if the court finds the merchandise is not on the final list, the proper basis of appraisement would be export value at invoice values.

The record consists of the testimony of five witnesses, two called on behalf of plaintiff and three on behalf of defendant. In addition, 11 exhibits were received on behalf of plaintiff and 8 on behalf of defendant, 1 of which was a collective exhibit (exhibits A–1 through A–4). Included before this court is the record in *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1971), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973). By the incorporation of the record in the previously decided case, the court has before it for consideration all of the facts established in the earlier case. The merchandise involved in that case is described in the findings of fact of the trial court as follows:

> 1. That the merchandise involved herein consists of the following electronic instruments and parts manufactured by Bruel &

[2] Section 402(b), as amended, provides:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Kjaer, Copenhagen, Denmark, and exported from that country from 1959 through 1962: 3322, audio frequency response and spectrum recorder; 3311, 3313, audio frequency spectrum recorders; 2111, 2112, 2141, audio frequency spectrometers; 1611, 1612, 1/3 octave filter sets; 1619, extension filter set; ZS–0146, filter chassis; 2603, 2604, microphone amplifiers; 3330, narrow band spectrum recorder; 2107, frequency analyzer; 2612, 2613, 2615, cathode, followers; 4131, 4132, 4133, 4134, condenser microphone cartridges; 4408, two channel microphone selector; UA–0030, input adaptor; UA–0034, flush mounting; UA–0039, extension connector; UA–0040, probe microphone set; UA–0051, UA–0052, nose cones; 4122, floor stand; JJ–2612, input adaptor.

It also appears from the court's decision that the enumerated instruments and parts were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended, predicated, as in the case at bar, upon the Customs' finding that the articles came within the final list designation, "Instruments and parts, laboratory, sound measuring." The record therein established that certain of the analyses and recording instruments were chiefly used for nonlaboratory purposes and therefore were erroneously appraised. They were items 3322, 3311, 3313, 2111, 2112, 2141, 1611, 1612, 1619, ZS–0146, 2603, and 2604.[3] The court found export value, as defined in section 402(b), Tariff Act of 1930, as amended, *supra*, to be the proper basis for valuation of those items. The appellate term in affirming the judgment of the trial court adopted and incorporated by reference the findings of fact and conclusions of law of the lower court. (70 Cust. Ct. 286, 295, A.R.D. 313.)

Defendant argues there is a difference in merchandise and time of importation in the incorporated case and in the case now before the court. The court agrees with defendant's position that the incorporated case cannot be *stare decisis* of the issue.

In the case at bar defendant contends the imported merchandise belongs to a class of articles which is chiefly used as laboratory instruments for purposes of experiment or study and was properly appraised on the basis of foreign value as defined in section 402a(c), *supra*, by virtue of enumeration on the final list.

Although the classification of the imported merchandise is not in issue, determination of whether an article comes within the final list enumeration is dependent in large part upon the classification status under the Tariff Schedules of the United States and the rules of construction applicable thereto. In ascertaining whether an article comes within the final list description, this court and the appeals court

[3] Audio frequency response and spectrum recorder; audio frequency spectrum recorders; audio frequency spectrometers; 1/3 octave filter sets; extension filter set; filter chassis; microphone amplifiers.

have been guided by its tariff classification. *National Carloading Corporation* v. *United States*, 53 CCPA 57, C.A.D. 877 (1966).

Plaintiff contends that whether or not a particular imported article is specified on the final list is not based upon the use in the United States of competitive domestic articles of the same class or kind. The uses in the United States, plaintiff contends, of domestically produced sound level meters and octave filter sets are not pertinent to the question of whether articles imported from Denmark, having a high degree of accuracy, are chiefly used in this country for laboratory purposes related to experiment and study. Plaintiff further alleges the imported instruments are not laboratory instruments or parts thereof within the meaning of the final list if the particular imported articles are suitable for supplemental use in a laboratory, but are chiefly used throughout the United States at the time of importation for practical commercial applications as distinct from the purposes of laboratory testing for experiment and study. Plaintiff contends *inter alia* the evidence establishes these particular instruments were chiefly used throughout the United States during the period in issue for practical commercial applications rather than for laboratory testing for experiment and study. It is also alleged the written material furnished by defendant's witnesses indicate competitive domestic articles, claimed by defendant to be of the same class or kind, were chiefly used throughout the United States during the time period involved for practical commercial applications.

In support of its position plaintiff cites the following cases wherein the courts based their determination as to whether the items in controversy were, or were not, "laboratory instruments" upon the question of whether the particular articles were chiefly used in a laboratory without reference to other articles of the same class or kind: *United States* v. *Dyson Shipping Co.*, 27 CCPA 260, C.A.D. 96 (1940); *Davies Turner & Co.* v. *United States*, 40 Cust. Ct. 439, 441, Abs. 61536 (1958); *Federal Electric Products Co.* v. *United States*, 35 Cust. Ct. 47, C.D. 1720 (1955); *Davies Turner & Co. et al.* v. *United States*, 29 Cust. Ct. 248, C.D. 1477 (1952); *Brabender Corp. et al.* v. *United States*, 8 Cust. Ct. 267, C.D. 619 (1942); *Cambosco Scientific Co.* v. *United States*, 8 Cust. Ct. 191, C.D. 601 (1942); and *Arthur H. Thomas Co.* v. *United States*, 72 Treas. Dec. 203, T.D. 49102 (1937).

The opinion of the appellate term in the case of *The A. W. Fenton Co., Inc.* v. *United States*, 70 Cust. Ct. 286, 289, A.R.D. 313 (1973), *aff'g* 67 Cust. Ct. 519, R.D. 11755 (1951), is pertinent to the issues now before this court. The appellate term stated:

> In its opinion the trial court noted that, absent any published guide as to the meaning and scope of the final ist term, "Instru-

ments and parts, laboratory, sound measuring", it would be appropriate to utilize, insofar as possible, the long settled rules applicable to the classification of "laboratory instruments". The court stated (67 Cust. Ct. 521–22):

> The term "laboratory instruments" has been construed as implying use for laboratory purposes. *R. J. Saunders & Co., Inc.* v. *United States*, 45 CCPA 87, C.A.D. 678 (1958); the Customs Court has indicated that "laboratory purposes" refers to use for experiment or study. *Westinghouse Electric Corporation* v. *United States*, 55 Cust. Ct. 271, C.D. 2589 (1965); *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abstract 67085 (1962). This court's construction of the term was noted without comment by the court of appeals without disturbing the same in *J. J. Boll, et al.* v. *United States*, 55 CCPA 86, 88, C.A.D. 937 (1968), and it appears to be a precedent of this court. The controlling consideration is therefore not the place where the merchandise was used but the purpose for which it was used. *Schick X-Ray Co., Inc.* v. *United States*, 62 Cust. Ct. 97, C.D. 3689, 295 F. Supp. 302 (1969).
>
> Furthermore, as the term in issue has been held to be a "use" provision, classification thereunder is predicated upon a finding that the merchandise was chiefly used for laboratory purposes. In challenging the finding, it is plaintiff's burden to establish the contrary by competent evidence. *Schick X-Ray Co., Inc.* v. *United States, supra; J. E. Bernard & Co., Inc.* v. *United States*, 44 Cust. Ct. 315, Abstract 63712 (1960).
>
> As the appraiser's finding of value is presumptively correct, 28 U.S.C. § 2633, plaintiff has assumed the burden of establishing either (1) that the analyses and recording instruments are not chiefly used for laboratory purposes, or (2) that all of the articles at bar are not sound measuring instruments within the meaning of the Final List.

The appellate term then stated at page 294:

> It is well settled that the actual use to which the importation is put is not controlling as to its chief use. *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967). Nor is testimony as to the use of the identical merchandise produced by the same importer sufficient: it is the use of the particular *class or type* of goods as a whole that is controlling. *Western Importing Company* v. *United States*, 62 Cust. Ct. 231, 297 F. Supp. 181, C.D. 3734 (1969); *Atkinson, Haserick & Co., Inc.* v. *United States*, 52 Cust. Ct. 215, C.D. 2463 (1964). In this aspect of the case the record is totally devoid of any testimony as to the uses of competitive articles of the same class or kind as that involved herein during the period in issue.

To sustain its burden of proof in the case at bar, plaintiff must establish that the imported articles are not laboratory instruments or

parts of laboratory instruments, i.e., those used for laboratory purposes. In *Applied Research Laboratories, Inc.* v. *United States*, 65 Cust. Ct. 505, 508, C.D. 4129 (1970), the court in reviewing the "laboratory purposes" stated:

> And this court has determined that "laboratory purposes" refer to use for experiment or study. *Thornley & Pitt, Misco, Inc.* v. *United States*, 58 Cust. Ct. 178, C.D. 2926, 266 F. Supp. 350 (1967); *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abstract 67085 (1962).

The defendant, in support of its position that chief use is determined on the basis of the chief use of a particular class or kind of article as a whole and not on the use of imported merchandise alone, cites among other authorities General Interpretative Rule 10(e)(i) of TSUS.[4]

Plaintiff's position is rule 10(e)(i) does not apply in the case at bar inasmuch as (1) the imported instruments were not classified under TSUS as laboratory instruments, and (2) that there is a congressional mandate that the aforesaid rule is to be used only for "the purposes of these schedules," and the question of whether or not the instruments in issue are to be used for laboratory purposes must, therefore, be predicated upon how the use or chief use provision of the final list was interpreted as of the time when the final list was enacted.

The court agrees that rule 10(e)(i) is not applicable to the case at bar. The test of chief use in effect prior to the tariff schedules is controlling. Chief use under the Tariff Act of 1930 was, however, basically the same as under TSUS. Such use was determined on the basis of the chief use of that class or kind of article at the time of importation throughout the United States, and not on the use of the imported merchandise. *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967); Sturm, *A Manual of Customs Law* (1974), p. 222. In order to prevail plaintiff must establish the chief use of the particular class of merchandise and that the importations themselves actually belong to that class. *Maher-App & Co., et al.* v. *United States*, 57 CCPA 31, C.A.D. 973, 418 F. 2d 922 (1969).

Mr. James W. Day, president and general manager of B. & K. Instruments, Inc., from 1958 to 1972, testified for plaintiff. He also executed an affidavit on August 15, 1975, which amplified his testi-

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[4] General Interpretative Rule 10(e)(i) provides:

10. *General Interpretative Rules.*—For the purposes of these schedules—

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(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined.

mony at the trial. (Exhibit 4.) Mr. Day had been a witness in *The A. W. Fenton Co., Inc.* v. *United States, supra*, the record of which is incorporated herein. He was also a witness in *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abs. 67085 (1962). Mr. Day testified that his company imports and markets instruments which are manufactured by Bruel & Kjaer of Denmark, including the subject articles. He said that he had sold B. & K. instruments in all of the States in the United States, his company being the exclusive U.S. importer and purchaser of Bruel & Kjaer instruments.

The witness stated he was familiar with the imported models 2203, 2204, and 1613, and the nature, functions, operations, uses, and purposes for which they were designed and used. He testified he had used those three instruments extensively and had seen others use them in their places of business and in the field.

Model 2203 was described as a sound level meter consisting of a sensor microphone, which operates on a capacitance principle that converts the sound pressure to an electrical signal. The signal is then amplified so that a meter can indicate the level of the sound measurement on a calibrated scale. Mr. Day said he had used that instrument several thousand times and had seen others use it 300 or more times.

The witness testified that model 2203 was used for practical commercial applications of measuring sound as it pertains to the health and welfare of people and for the calibration of audiometers. Mr. Day said it was largely used for measurement of sound in the field to establish if certain machinery met a criteria that had been set by either the customers or the manufacturers.

Model 2204 was described as a sound level meter comprising a condenser microphone, a sensor to convert the sound pressure to an electrical signal, and the electronic amplifier to increase the amount of the electrical signal so that a meter can register the pressure impinging on the microphone. The witness characterized models 2203 and 2204 as miniaturized versions of the microphone amplifiers in the incorporated case, *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1971), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973). It is noted in that case the microphone amplifiers were held chiefly to be used for nonlaboratory purposes.

Model 1613, an octave filter set or combination of filters in a single package designed solely to be attached to either model 2203 or 2204 sound level meter, was according to the witness a miniaturized version of the models 1611 and 1612 filter sets which were before the court in the incorporated case. In *The A. W. Fenton* case (R.D. 11755) plaintiff had established *prima facie* that models 1611 and 1612 were chiefly used by the Government and private companies in practical,

commercial applications such as quality control, preventive maintenance, incoming inspection, and establishment of specifications for commercial products and not in experiment or research. Defendant therein offered no evidence, nor was there anything of record to refute or contradict that aspect of testimony.

Mr. Day also testified that he had sold the instruments in issue to industrial hygienists and safety engineers of industry, the military, accoustical consultants, national, state, and city health departments, insurance companies, sound system installations, speech, hearing centers, otologists and otolaryngologists, and for quality control.

Gunnar Rasmussen, plaintiff's rebuttal witness who worked on the B. & K. models 2203 and 2204 sound level meters and developed a microphone used with those meters, said the three instruments were specifically designed for falling outside the class of articles that he recognized as laboratory instruments.

William C. Sperry,[5] who testified for defendant, said he had used the B. & K. 2203 sound level meter and the 1613 octave filter sets in General Electric's laboratory. For the most part they were used for field measurements and experiments, the results of which were analyzed at Mr. Sperry's direction. Material provided by the analysis would invariably go into a report, which would discuss the problem and its solutions and include recommendations. Mr. Sperry considered that type of work to be research laboratory work. While working for the Federal Aviation Administration, he had observed, on some occasions, models 2203 and 1613 in programs of applied research and demonstration, both in a fixed laboratory and in a field laboratory, and had seen them used in measuring aircraft noise and in measuring components of aircraft engine noise.

Defendant proffered the testimony of Anthony W. Paolillo, a professional engineer in charge of the New York City Transit Authority's Environmental Staff Division (formerly the Sound and Vibration Analysis and Control Group). The witness testified his group investigated problems of noise and vibration in the transit system during the period in issue. Mr. Paolillo considered the B. & K. 2203 to be both a satisfactory field testing instrument and a satisfactory laboratory instrument. He said he could have used the 2203 and the 1613 or the 2204 and the 1613 in a fixed area, which he described as a laboratory in his operation.

From the foregoing evidence, it is concluded that the importations either were or could be utilized for both laboratory and practical

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[5] During the relevant time period Mr. Sperry said he had worked for the Illinois Institute of Technology, Research Institute, a contract research laboratory involved in ultrasonic and psychoacoustics work but mostly noise control; General Electric; and the Federal Aviation Administration.

commercial purposes. In the case at bar we are not concerned with use of the importations as such but with chief use of the particular class or type of goods. *E. Dillingham, Inc.* v. *United States, supra; The A. W. Fenton Co., Inc.* v. *United States, supra.*

In order to determine whether the importations herein belong to the particular class or kind of sound measuring and related instruments, a review of the factors found by the court to be pertinent must be considered. Such factors include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. Susceptability, capability, adequacy, or adaptability of the import to the common use of the class is not controlling. *United States* v. *The Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976); *Pistorino & Company, Inc.* v. *United States*, 81 Cust. Ct. 106, C.D. 4774 (1978).

Based upon the testimony of Dr. Peterson and Mr. Paolillo it has been established that during the relevant time period, instruments manufactured by American companies were used for the same purposes, were competitive with and met the same standards as the imported B. & K. sound level meters and octave filter sets.

According to Dr. Peterson, General Radio sound level meters and the octave-band analyzer were sold throughout the United States. The sound level meters were sold in competition with the B. & K. sound level meters. The octave-band analyzer was sold in combination with B. & K.'s sound level meters and octave filter sets. The witness considered his company's sound level meters (1551C, 1565A, and 1561) to be of the same class or kind of instrument as the B. & K. sound level meters. All met the same relevant U.S. standards. Dr. Peterson considered the combination of the General Radio 1558 octave-band noise analyzer and its 1551C sound level meter to be the same class or kind of instruments and performing the same function as the combination of the B. & K. 2203 and 1613. He stated that Hewlett-Packard, Columbia Research, and H. H. Scott produced sound level meters and were competing for the same customers.

Mr. Paolillo testified that prior to purchasing equipment to investigate noise and vibration in the transit system, his group gave consideration to instruments manufactured by General Radio, B. & K., and H. H. Scott. The General Radio model 1551C sound level meter

was among the instruments purchased. The witness stated the 1551C and B. & K. 2203 were alternative choices. The price was very close, the instruments were equally suitable, and both met the American standards and performed the same function. The group additionally acquired another model of General Radio sound level meter and a B. & K. package, which included a 2204 sound level meter, as well as a 1613 octave filter set. Mr. Paolillo said all met the standards applicable during the related period.

Mr. Rasmussen testified he was personally familiar with all of the sound meters produced by General Radio Co., Columbia Research Co., and H. H. Scott Co., as he was required to know the competitive market situation. He had seen them at exhibitions, trade shows and technical seminars in the United States. In the witness' opinion the General Radio 1551C sound level meters were of the same capabilities as the 2203, 2204, and 1613. There were differences in that the B. & K. instruments and those of General Radio did not have the same reproducibility. The witness did not regard General Radio's 1551C sound level meter to be as satisfactory as the 2203, 2204, and 1613. The B. & K. models were not suitable for indoor mountings, as they were hand-held and more suitable for practical field use. Mr. Rasmussen conceded that conditions could exist where the B. & K. 2203 and General Radio 1551C would come very close to each other. He said the 1551C, as well as the 2203 and 2204, met the applicable standard for the sound level meters in effect during the related time period. The witness testified that the B. & K. 2603 was comparable to the General Radio 1561 instrument but the B. & K. 2203, 2204, and 1613 were more suitable for practical field uses as they were hand-held.

There are no samples of the importations before the court. Nor are there samples of domestic instruments. In evidence, however, are advertisements which illustrate and describe the instruments. They are supportive of testimony proffered by Dr. Peterson and Mr. Paolillo on the issue of class or kind. B. & K. models 2203, 2204, and 1613 are shown to be hand-held, compact, lightweight, and battery operated.[6] General Radio's catalog S (exhibit F–1) describes its 1551C sound level meter as compact and portable, weighing less than 8 pounds with battery; the 1565A sound level meter as pocket sized and lightweight (1¾ pounds), powered by a single 1.5 volt C cell; and the 1558 octave-band noise analyzer as small, compact, and portable, weighing less than 9 pounds and battery operated.

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[6] Exhibit A–1 illustrates B. & K. model 2203 sound level meter with model 1613 octave filter set as hand-held and describes it as compact, lightweight, and battery operated. Exhibit A–3 illustrates B. & K. model 2204 sound level meter as hand-held and describes it as being "in a portable, battery-operated, hand-held package."

The record establishes the imported sound level meters and the octave filter sets, which were designed solely for use with the meters, were used to measure sound, for calibration, and for research and accumulation of data to establish noise standards. The domestic General Radio sound level meters and analyzer were used basically to measure and analyze sound. The ultimate purchasers of both the imported and domestic instruments were industry, government, the military, educational and research institutions, and acoustical consultants. Testimony had been elicited that Hewlett-Packard, Columbia Research, and H. H. Scott produced sound level meters and were competing for the same customers.

It is clear from the evidence of record that the importations and the domestic instruments were used to measure sound. In some instances the results of such measurement were utilized for commercial purposes. In others, information obtained in the field was essential for laboratory purposes, i.e., for experiment and study. The two kinds of merchandise were sold to the same class of purchasers.

In *The Golding-Keene Company et al.* v. *United States* (*E. Dillingham, Inc., a/c Rheem Mfg. Co., Party in Interest*), 44 Cust. Ct. 169, C.D. 2172, 183 F. Supp. 947 (1960), *aff'd*, 48 CCPA 66, C.A.D. 766 (1961), the trial court held the phrase as found in section 516(b), Tariff Act of 1930, as amended, did not require the imported merchandise to be identical with the product of the domestic producers. The record therein included evidence to the effect that the two kinds of merchandise were sold to the same class of purchasers and were used for the same purpose.

In the case at bar it is clear from the testimony and the exhibits that the importations while not identical to the domestic instruments are basically used for the same purposes and are sold to the same class of purchasers. The court, therefore, concludes that the importations are of the same class or kind as the domestic sound measuring instruments.

The basis of appraisement herein was predicated upon a finding that the merchandise was chiefly used for laboratory purposes within the purview of the final list designation. As the Customs officials' finding of value is presumptively correct (28 U.S.C. § 2635(a)), plaintiff has the burden of establishing that instruments of the same class or kind are not chiefly used for laboratory purposes. Chief use must be predicated upon evidence which is representative of an adequate cross section of the country, *L. Tobert Co., Inc., et al.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953), with respect to use by users, as a whole, of the particular type of commodity involved and not upon the actual individual use of a particular shipment in issue, *United States* v. *Spreckels Creameries, Inc.*, 17 CCPA 400, T.D. 43835 (1930).

The record establishes that merchandise of the class or kind to which the imported merchandise belongs is used for both laboratory (research and study) and nonlaboratory (commercial) purposes. Accordingly, plaintiff has failed to overcome the presumption of correctness attaching to the appraisement.

In view of the foregoing and on the record before it, the court makes the following findings of fact and conclusions of law:

Findings of fact

1. That the merchandise of the reappraisement appeals herein consists of sound level meters, models 2203 and 2204, and model 1613 octave filter sets, exported from Denmark by Bruel & Kjaer and entered at the port of Cleveland, Ohio.

2. That B. & K. Instruments, Inc., the plaintiff-importer of record, and Bruel & Kjaer, the exporter, were at the time of exportation related persons within the meaning of section 402(g) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

3. That the importations are conceded to be sound measuring instruments or parts thereof.

4. That the involved merchandise was found to be on the final list issued by the Secretary of the Treasury, T.D. 54521, under the provision for "Instruments and parts, laboratory, sound measuring."

5. That the articles were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, at the invoiced unit prices, net, packed, plus 29.03 percent.

6. That plaintiff has failed to establish that the imported items of merchandise are of a class or kind which are not chiefly used for laboratory purposes and, hence, not within the final list designation.

Conclusions of law

1. That foreign value, as that value is defined in section 402a(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, is the proper basis for appraisement of the merchandise here involved.

2. That the presumption of correctness attaching to the customs officials' valuations of the merchandise in question has not been overcome.

3. That the foreign value for the merchandise herein is represented by the appraised values.

Judgment will be entered accordingly.

(C.D. 4804)

SWIFT INSTRUMENTS, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.	Court No. 72–1–00119

Microscope cases

IMPORTED WITH PARTS—SOLD WITH COMPLETE ARTICLES—SEPARATE CLASSIFICATION

Microscope cases imported from Japan in same shipments with frames, mountings and other microscope parts and classified in liquidation pursuant to headnote 2, TSUS schedule 7, part 2, with said articles under TSUS item 708.80, *Held*, properly classifiable separately as claimed as microscope cases lined with textile fabric under TSUS item 204.50 where the established facts disclose that the cases are ordinarily sold at retail with complete microscopes and not with the parts with which the cases were imported, and where the partial lining in the cases is functional and, hence, is not *de minimis* or insignificant.

[Judgment for plaintiff.]

(Decided May 22, 1979)

Glad, Tuttle & White (*Stephen S. Spraitzar* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Susan C. Cassell*, trial attorney), for the defendant.

RICHARDSON, Judge: This action is submitted for decision upon a merchandise sample which consists of wood microscope cases of Japanese origin, imported through the port of San Francisco, Calif., between April 1966, and December 1968, in the same shipments with frames, mountings, and other parts of microscopes of like origin; and a stipulation that the imported cases are approximately 18½ inches high, 10¾ inches wide, and 14¼ inches long. It is also stipulated that the cases (1) are in chief value of wood, (2) are ordinarily sold at retail with a complete microscope, (3) are not ordinarily sold at retail with frames, mountings, and parts thereof of the character with which they are imported, (4) are partially lined with a textile material which is approximately 20 inches long and 3¼ inches high located at the rear of the case, (5) that the purpose of the lining is to provide a good fitting of the microscope in the case, to prevent the scratching of the microscope by the case, and to preserve the cosmetic appearance of the microscope, and (6) that the total surface area inside the

microscope case is approximately 1,102.5 square inches, and the textile lining inside the microscope case covers approximately 65 square inches.

Upon importation the merchandise, including the cases in dispute, was classified in liquidation pursuant to headnote 2 of TSUS schedule 7, part 2, under the provision in item 708.80 for "Frames and mountings, and parts thereof: For compound optical microscopes" at the duty rate of 30 or 27 per centum ad valorem, depending upon date of entry. Headnote 2, supra, provides, "Cases, boxes, and containers of types ordinarily sold at retail with the instruments or other articles provided for in this part are classifiable with such articles if imported therewith."

Plaintiff claims that the cases are properly classifiable under TSUS item 204.50 as modified by T.D. 68–9 as microscope cases lined with textile fabrics at the duty rate of 2 cents per pound plus 5 per centum ad valorem or 2 cents per pound plus 4.5 per centum ad valorem, depending upon date of entry. Alternatively,* plaintiff claims that the cases should be classified under TSUS item 204.40 as microscope cases not lined with textile fabrics at the duty rate of 16¾ per centum ad valorem.

Plaintiff contends that the imported cases are not classifiable under item 708.80 because they are not ordinarily sold at retail with the articles with which they were imported. Plaintiff argues, "Headnote 2 is intended to classify the cases which are so closely associated with the instruments or articles, under the provision providing for these instruments or articles if the cases are imported with these instruments." (brief, p. 13) Defendant contends that headnote 2 mandates that microscope cases imported with frames and mountings provided for in item 708.80 be classified therewith. Defendant argues, "It is undisputed that these cases are 'ordinarily sold at retail' with complete microscopes [stipulation, para. 8], and that the frames and mountings imported with these cases were assembled into the very microscopes which were sold at retail with the imported cases [complaint, para. 9]." (brief, p. 6)

Plaintiff further contends that the cases are "lined" within the meaning of item 204.50. Plaintiff argues that "item 204.50 encompasses partially lined microscope cases as well as completely lined cases." (brief, p. 16) Defendant contends, in the event the court determines the classification of the cases to be erroneous, that the cases are classifiable under item 204.40, and not 204.50. Defendant argues, "it is clear that the textile fabric contained in the microscope

*Plaintiff's primary and alternative claims were set up in reverse order in the complaint. Also, a second alternative claim in the complaint for classification of the cases under TSUS Item 207.00 has been abandoned.

cases is insufficient, as a matter of law, to render the importation 'lined,' for tariff purposes * * *." (brief, p. 8)

The court agrees with plaintiff. The wood microscope cases should not have been classified under item 708.80 under the facts of record since the associated articles classifiable thereunder, i.e., frames, mountings, and other microscope parts, are incompatible with the imported cases, and, admittedly, are not sold at retail with these cases. The court reads headnote 2, *supra*, as requiring compatibility between the imported cases and instruments or other articles *as of the time of importation* in order for the headnote to control classification of the cases.

Classification of imported merchandise not governed by use must be determined on the basis of the condition of the merchandise *at the time of importation*. *Leonard Levin Co.* v. *United States*, 27 CCPA 101, C.A.D. 69 (1939). Admittedly, at the time of importation of the disputed cases the associated articles imported therewith were not microscopes—the only articles with which the subject cases are compatible and with which they are ordinarily sold at retail. And it is only when these associated articles are *assembled with other components after importation* that the resulting microscopes acquire compatibility with the cases. That post-importation considerations were not intended by the framers of headnote 2, *supra*, to be the occasion for its application is reflected in the draftsman's notes by way of reference to the microscope as an exemplar, wherein it is stated:

> * * * Many articles such as microscopes are ordinarily sold with a case of wood or other material which not only provides protection for the instrument during transportation but also in the laboratory or elsewhere when the instrument is not in use. These cases, which are usually of special design, are so closely associated with the instrument that they should be classifiable therewith if imported with such instruments. [*Tariff Classification Study, Schedule 7*, p. 139 (1960).]

As for the matter of the textile lining, the court is of the opinion that the disputed cases are "lined" within the meaning of item 204.50. There is nothing in the provision which prescribes the *quantum* of lining a case must possess in order to be deemed "lined" for classification purposes. Consequently, each issue presented under the provision must be judged on the basis of its own peculiar facts.

An inspection of the interior of the sample case (joint exhibit A) indicates that practical considerations dictated that the 65 square inches of lining inside the case were considered adequate to achieve the goals of (1) providing a good fitting of scope to case, (2) the avoidance of scratches on the scope from the case, and (3) the preservation of the cosmetic appearance of the scope. At the base there are built-in wood inserts arranged in a horseshoe configuration of ap-

proximately 20 inches in length and 3¼ inches in height. It is this horseshoe configuration which received the lining, undoubtedly for the purpose of accommodating the horseshoe-shaped base of the scope in a snug fit. And since not all parts of a microscope are likely to come into contact with the case, placement of the lining elsewhere in the interior would appear to be superfluous.

In any case, the upper portion of the case interior of joint exhibit A is equipped with offsetting wood structural inserts (top) and metal guide rails (sides), the obvious purpose of which would appear to be the promotion of stability of the upper portion of the microscope through minimization of movement in the case. Additionally, against the interior of the hinged door of the case round rubber cushions have been cemented to facilitate stabilization of the scope when in the case. All in all, the case appears to have been precision-built to house a particular shaped microscope; and, in view of the concession that the microscopes are ordinarily sold with these cases, the court infers that the avowed goals of the partial lining have in fact been achieved.

The partial lining, which comprises approximately 5.9 percent of the total inside surface of the case, is clearly functional, and, therefore, cannot be deemed *de minimis* or insignificant, notwithstanding the fact that the case is not fully lined. See and compare, *Bemis Bro. Bag Co.* v. *United States*, 11 Ct. Cust. Appls. 373, T.D. 39162 (1922), wherein colored fabric comprising only 3 percent of the surface area was held sufficient to sustain classification of the fabric as "colored" as opposed to "uncolored". The record supports classification of the cases under item 204.50 as claimed.

Judgment will be entered herein accordingly.

(C.D. 4805)

MATTEL, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 74–4–01035

Phonograph records

AMERICAN GOODS RETURNED—LACK OF DOCUMENTATION—TOYS *v.* EO NOMINE CLASSIFICATION

American made plastic records imported at Los Angeles-Long Beach, Calif., from Mexico with other merchandise and classified in liquidation under TSUS item 737.90 as toys, and parts of toys, nspf, *Held*, (1) not classifiable as claimed under TSUS item 800.00 or 807.00 as American goods returned or as American components of

articles assembled abroad where claim-supporting documents were not filed with the entries in the office of the district director in accordance with 19 CFR 10.1, and the failure to timely file such documents appears from the evidence to have been *intentional*; and (2) filing with the court under 19 CFR 10.112 is not permissible because the burden of proof on the importer to negate willful negligence in the failure to effect timely filing of the requisite documentation had not been met, and (3) are classifiable as alternatively claimed under the *eo nomine* provision for phonograph records in TSUS item 724.25 where the Government concedes them to be such, and the evidence establishes that these conversational records, which are at times sold separately as replacements or supplements, are more suitable for the mental development of children than for their amusement.

[Judgment for plaintiff.]

(Decided June 4, 1979)

Irell & Manella (*Richard H. Borow*, *Louise A. Lamothe* (*Wheeler*) and *Noel K Torgerson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Saul Davis*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this action consists of U.S. manufactured phonograph records which were packaged in Mexico and exported therefrom in 1972 in association with other merchandise (toy telephones) not in issue here. Upon entry at Los Angeles-Long Beach, Calif., the records were classified in liquidation under TSUS item 737.90 as modified by T.D. 68–9 as toys, and parts of toys, not specially provided for, other, at the duty rate of 17.5 per centum ad valorem. The plaintiff-importer claims primarily that the records are entitled to duty-free entry under TSUS item 800.00 as products of the United States, returned without advancement in value or improvement in condition. Alternatively, plaintiff claims that the records are entitled to a duty-free allowance under TSUS item 807.00 as American components of articles assembled abroad. And, in the event the court determines that neither item 800.00 nor item 807.00 is applicable, plaintiff claims that the records should be classified under the *eo nomine* provision for phonograph records in TSUS item 724.25 as modified by T.D. 68–9 at the duty rate of 5 per centum ad valorem.

Claim-supporting documents, that is, foreign shipper's declaration certifying to the best of his knowledge and belief the articles are products of the United States, and are returned to the United States without having been advanced in value or improved in condition by any process of manufacture or other means; owner's declaration on

Customs form 3311 that the articles are the manufacture and product of the United States and are returned without having been advanced in value or improved in condition by any process of manufacture or other means; district director of Customs' certificate of exportation on Customs form 4467 showing that no drawback, bounty, or allowance has been paid or admitted thereon; foreign assembler's declaration, owner's endorsement on foreign assembler's declaration, which are prerequisite to classification of imported merchandise under either item 800.00 or item 807.00 have admittedly not been filed for the records in connection with any of the 10 entries involved in this action as required under section 10.1 of the Customs Regulations (19 CFR 10.1, revised as of January 1, 1972). Such documents have, however, been tendered by plaintiff to the court under the late filing permitted under section 10.112 of the Customs Regulations* (19 CFR 10.112) in the absence of *willfulnegligence* or *fraudulent intent.*

Counsel for the defendant concedes that since liquidation has not become final and plaintiff failed to comply with Customs filing regulations before the Customs Service lost jurisdiction to act on the claim-supporting documents, and jurisdiction is now in the Customs Court, that the claim-supporting documents may be filed with the Customs Court if the filing complies with 19 CFR 10.112 in that there is a showing that the late filing has not been due to "willful negligence or fraud." (R. 14–15.) Counsel for defendant contended that there was willful negligence and undertook to adduce evidence to support his contention.

At the trial the court took this issue under advisement, and has now concluded that the documents tendered to the court and the testimonial record do not establish compliance with the mandatory regulations regarding documentation for alleged duty-free components, since the importer has failed to meet its burden of establishing that its failure to file in a timely manner was not due to "willful negligence." In fact the record shows that the failure to timely file was *intentional*, which for purposes of section 10.112, is the legal equivalent of willful negligence.

Mr. Kenneth W. Waymire, director of import-export administration of Mattel, Inc., and Mr. Richard E. Segesser, manager of import-export documentation, testified that they intended to file, and believed they had filed all necessary information in support of Mattel's claim for duty-free entry. until this litigation commenced. (R. 93–94, 137,

* Sec. 10.112 read in 1972 "Whenever a document, form, or statement required by regulations in this part to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed for its production but failure to file it was not due to willful negligence or fraudulent intent, such document, form, or statement may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final."

173.) Plaintiff did file free-entry documents with the Customs Service, but specific mention of the phonograph records was omitted.

Mr. Waymire also testified that when he knew customs was not going to give duty-free treatment to components, he did not file documents required by the regulations. (R. 104–05.) Mr. Segesser testified that it was standard operating procedure in 1972 *not* to file the necessary documents to claim duty-free treatment under TSUS item 800.00 or 807.00. The footnote on plaintiff's exhibit 15–B (constructed cost figures on the Mattel-O-Phone filed in 1972 by Mr. Waymire) states: "Importer requesting judicial ruling that this merchandise is applicable under items 800.00 or 807.00 TSUS" (R. 145–46.) exhibits 15–D, 15–E, and 15–F contain the same footnote. This notice of an intention to seek a judicial ruling as to the applicability of a lower dutiable classification shows an intent not to seek a timely ruling by the Customs Service.

The court also reserved rulings on the admissibility into evidence of all exhibits with respect to duty-free entry, except collective exhibit 10 (certificate of registration and certificate of return on form 4455), which the parties stipulated to admit into evidence. The signers and presenters of the various documents which plaintiff seeks to have admitted, Waymire and Segesser, had no personal knowledge of the factual matters contained therein and utilized and relied upon facts and figures produced by Mattel departments other than their own for the facts stated therein. Mr. Waymire, testified that he did not personally verify the correctness of the contents of the documents, nor would anyone in his department do so. (R. 113.) He had no personal knowledge of the contents of the claim-supporting documents, exhibits 9, 11, 13, and 19, and he did not supervise the clerks who prepared the documents which he signed. (R. 98.) None of the people who produced said facts and figures of constructed costs were present in court to support their work product. It was not for defendant to call witnesses to refute the testimony of persons who did not prepare, but merely signed, the documents. It was for plaintiff to produce the persons who were knowledgeable on the facts and who prepared the documents. Since the collective exhibits and testimonial record show that none of the individuals who filled out or signed the documents necessary for duty-free entry possessed the requisite personal knowledge of the facts or supervisory responsibility of those who supplied the facts to which they were testifying, the documents are not admissible into evidence.

Moreover, the intentional character of the nonfiling of the duty-free entry documents is reflected in the manner in which the phonograph records were entered. Entry of the records was governed by a

superseding "Importer's Duty Code Worksheet" (to be attached and incorporated therein as part of the consumption entry) which was typed June 21, 1972, and given to the broker by plaintiff. Under this code, category "GGGG" referred to "records, toys, NSPF of rubber or plastics, other" which were listed as being classifiable under TSUS item "737.9020" at the duty rate of "17.5 percent", and under which was the notation "Importer asking for judicial ruling at '724.2500'" at the rate of duty of "5 percent." This duty code worksheet is included in every entry before the court. And in every entry, code "GGGG" is referenced to yet another document entitled "Duty Calculation Worksheet" which, in some instances, is signed by R. Segesser—plaintiff's manager of import-export documentation. In this document under code "GGGG" the notation "N/A" (meaning not applicable) has been entered opposite the columns "800.00 TSUS" and "807.00 TSUS"

In fact, in one instance involving entry No. 73–120890 dated August 21, 1972, of protest 27043004626, a mistake was made in entering a value figure opposite the column "800.00 TSUS" on the duty calculation worksheet under code "GGGG." However, this value figure was erased by means of a type correction fluid and the notation "N/A" written over it. Thus, it clearly appears that plaintiff's *supervisory* personnel deliberately directed the entry of the records under a dutiable classification with the expectation of seeking judicial reclassification of the records under another *dutiable* category—a posture in which claim-supporting documents would constitute no part of the entry documentation.

Since it is not the function of section 10.112 to relieve an importer from the consequences of its deliberate acts, the court would be obliged on this record to leave the defaulting importer where it found itself and not permit late filing of the claim-supporting documents. It follows, therefore, that in the absence of compliance with the requirements of section 10.1 plaintiff's claims for classification of the records under either item 800.00 or item 807.00 must fail, and the court so holds.

Turning now to plaintiff's residual claim for classification of the records under item 724.25, the evidence discloses that the records are of three types:

(1) Mattel-O-Phone records (exhibit 1–B) consisting of 4-inch plastic discs with interleaved spiral grooves (independent sound tracks in each groove) to produce sound when played on the phonograph inside the Mattel-O-Phone housing (exhibit 1–A) and packaged in an assortment of 5 records (each with a different sound track) in the Mattel-O-Phone retail package;

(2) Talking Pictures – Alphabet Phone records (exhibit 2–B) consisting of 2½-inch plastic discs with spiral grooves to produce sound when played on the phonograph inside the Alphabet Phone housing (exhibit 2–A) and packaged in an assortment of 6 records (each with a different sound track) in the Alphabet Phone retail package;

(3) Talking Pictures – Nice Neighbors Phone records (exhibit 3–B) consisting of 2½-inch plastic discs with spiral grooves to produce sound when played on the phonograph inside the Nice Neighbors Phone housing (exhibit 3–A) and packaged in an assortment of 6 records (each with a different sound track) in the Nice Neighbors Phone retail package.

At the trial defendant stipulated that the records in issue are phonograph records. Additionally, Joseph S. Whitaker, vice president of marketing for Mattel Toy Co., a division of plaintiff corporation, testified that the phones had an intended use as toy telephones simulating for the child telephone play, utilizing the imported records. The witness testified that on the basis of marketing research studies the actual and chief use of the phonograph records was the intended use, and that the records had no independent play value apart from such intended use. Additionally, it appears that the records are at times sold separately as replacements or supplements.

Plaintiff argues that since the records are specifically provided for they must be separately classified, citing *Craig Panorama, Inc.* v. *United States*, 59 Cust. Ct. 97, C.D. 3085 (1967). Defendant argues that the records are an integral component of the toy telephone, and must be classified as an entirety with the telephone. The court agrees with plaintiff.

In *Craig Panorama, Inc.* v. *United States*, *supra*, the merchandise consisted of 9–volt batteries imported with radios and earphones. The court sustained the classification of the batteries as separate entities under the fifth clause of paragraph 353 of the Tariff Act of 1930 as modified by T.D. 52739 as against the importer's claim for classification of the batteries under the second clause of that paragraph as *entireties* with the radio, citing, among other things, the well-known maxim that the mere fact that two articles are designed and constructed to be used together does not necessarily make either a part of the other. The same maxim is applicable here.

In the 1930 and prior Tariff Acts there was no separate *eo nomine* provision for phonograph records, and such records were classified under the provision for phonographs and parts thereof in paragraph 1542 of the 1930 act and in various provisions of predecessor acts. See footnote 2 in *United States* v. *Radio Corp. of America*, 41 CCPA 137, 138, C.A.D. 541 (1953) citing *American Express Co.* v. *United States*,

4 Ct. Cust. Appls. 279, T.D. 33490 (1913). However, with the advent of the Tariff Schedules and the carving out of a separate *eo nomine* provision therein for phonograph records in item 724.25 while retaining intact the provision for phonographs and parts thereof in item 685.32, Congress clearly evidenced an intention to treat phonograph records as *separate entities*. Consequently, there no longer appears to be any sound reason for treating phonograph records as parts of or as entireties with phonographs for tariff purposes. *Cf. Poynter Products, Inc.* v. *United States*, 64 Cust. Ct. 293, 298, C.D. 3993 (1970).

An examination of the toy telephones with which the imported records are associated in use reveals them to be nothing more than phonographs disguised as simulated telephones—undoubtedly to serve as the medium for the attraction of children. But defendant has conceded that the involved records are phonograph records. And the evidence establishes that the records have no independent play value in and of themselves, as do, perhaps, the telephones. Moreover, after playing and listening to the record samples in evidence the court is convinced that these two-way conversational records possess an instructional or educational character and, hence, are more suitable for the mental development of children than for their amusement. See, *B. Shackman & Company, Inc.* v. *United States*, 67 Cust. Ct. 372, C. D. 4300 (1971); *Thorens Co.* v. *United States*, 15 Cust. Ct. 165, C. D. 965 (1945).

Therefore, on the evidence presented the court concludes that the involved records are not "toys" or "parts of toys" within the ambit of item 737.90, and are properly classifiable as claimed as "phonograph records" within the meaning of item 724.25. Judgment will be entered herein accordingly.

(C.D. 4806)

NOVO ENZYME CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Microbial milk-clotting enzymes

An importation of microbial enzyme preparation, used for the manufacture of cheese, classified under item 437.49, Tariff Schedules of the United States, as other enzymes and ferments, *held* properly subject to classification under item 437.46, Tariff Schedules of the United States, as rennet.

Eo nomine designations without terms of limitation include all forms. The meaning of such designation is determined as of the date of the tariff statute and includes all articles subsequently created

which fall within the scope of the provision. *Sears, Roebuck and Co.* v. *United States*, 46 CCPA 79, C.A.D. 701 (1959); *Hoyt, Shepston & Sciaroni, S. Blondheim & Co.* v. *United States*, 52 CCPA 101, C.A.D. 865 (1965).

In determining whether an *eo nomine* designation embraces an article, use may be considered in order to establish its identity. *United States* v. *Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959).

Court No. 76-5-01079

[Judgment for plaintiff.]

(Decided June 15, 1979)

Barnes, Richardson & Colburn (*David O. Elliott* and *Peter J. Fitch* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Steven P. Florsheim* and *Sidney N. Weiss*, trial attorneys), for the defendant.

FORD, Judge: This action contests the classification of a microbial enzyme preparation, described on the import invoice as "Rennilase." Rennilase is used in the curdling of milk for the manufacture of cheese. The merchandise in issue was produced in Denmark and entered at New York.

The merchandise was classified under item 437.49 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as "Enzymes and ferments: * * * Other," at 5 per centum ad valorem. Plaintiff claims the proper classification is under TSUS item 437.46 which provides for "Enzymes and ferments: Rennet," free of duty. Specifically, these statutory provisions read as follows:

Tariff Schedules of the United States:

SCHEDULE 4.—CHEMICALS AND RELATED PRODUCTS

Part 3.—Drugs and Related Products

Subpart B.—Alkaloids, Antibiotics, Barbiturates, Hormones, Vitamins, and Other Drugs and Related Products

*	* * * * * * *	
	Enzymes and ferments:	
437.46	Rennet	Free
*	* * * * * * *	
437.49	Other	5% ad val.

Plaintiff contends the enzyme preparation in question is "rennet" within the meaning of that term as used in item 437.46. The term

"rennet," it is alleged, encompasses a group of enzyme preparations which coagulate milk to produce a curd suitable for making cheese and, as such, includes all enzyme preparations, whether from animal, plant or microbial sources. This is so since item 437.46 is an eo nomine provision which includes all forms of the named article. Plaintiff asserts the microbial preparation Rennilase is a form of rennet.

Alternatively, plaintiff urges that item 437.46 is a use provision, that is, a provision by which the classification of the import is determined by the use to which the import is intended. Since Rennilase is exclusively used for making cheese, plaintiff claims it to be properly classifiable as rennet.

Defendant does not dispute that the enzyme preparation in question is principally used to make cheese. While rejecting the construction of item 437.46 as a use provision, defendant agrees with plaintiff that it is an eo nomine provision. Nevertheless, defendant maintains that plaintiff's definition of "rennet" is overbroad and incorrectly encompasses microbial enzyme preparations such as Rennilase.

Defendant maintains the term "rennet" refers only to milk-clotting enzyme preparations which are derived from the fourth stomach of ruminant animals. Defendant's definition does not recognize any plant source for rennet and only selectively recognizes animal sources. Defendant contends milk-clotting enzymes derived from four-stomached animals as cows, sheep, and goats constitute rennet, but enzymes extracted from pigs' stomachs are not rennet.

The record consists of testimony of 5 witnesses called on behalf of plaintiff and receipt in evidence of 18 exhibits. Plaintiff's witnesses included a representation of persons involved, both commercially and academically, in the enzyme and cheese fields. These witnesses included a quality control director of the plaintiff's corporation, a microbiologist for a pharmaceutical company, a university professor of food science, a management and research representative of an enzyme products corporation, and a recently retired scientist who was employed by a cheesemaking company for approximately 40 years.

Mr. William McMullen, with an M.S. in chemistry, has been director of analytical and quality control laboratories for plaintiff corporation for 7 years. Novo imports and sells enzyme products. Mr. McMullen's previous 22-year employment with Pfizer Co. included chemical and quality control work in the area of enzymes.

Dr. Joseph Sardinas, with a Ph. D. in microbiology, has been employed by Pfizer, Inc.[1] for 28 years. Pfizer is a multinational, pharmaceutical company. Dr. Sardinas holds seven patents in the enzyme field, one of which is related to milk-clotting enzymes.

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[1] It is not clear from the record whether Pfizer & Co. is a subsidiary of Pfizer, Inc., but the two corporations appear to be interrelated.

Dr. Frank V. Kosikowski, with a Ph. D. in dairy chemistry and biochemistry and microbiology, has been a professor of food science at Cornell University for 32 years. He shares eight patents, which involve microbial enzymes, bacteria removal from milk, and dairy product packaging. The witness has performed consulting services for microbial enzyme companies, government agencies, and the United Nations.

Dr. Theodore Cayle is vice president and technical director of Dairyland Food Laboratories, which manufactures milk coagulants, various rennets, and other enzyme products for the manufacture of cheese. Prior to his association with Dairyland, Cayle was director of research at Wallerstein Co., Division of Baxter Laboratories, an enzyme manufacturer. He holds a Ph. D. in plant biochemistry and microbiology.

Plaintiff's final witness, Dr. J. B. Stine, was employed by Kraft Foods from 1934 until his retirement in 1976. Until 1962, Dr. Stine's duties at Kraft involved only cheese. After that date, his responsibilities included all Kraft products. His Ph. D. is in dairy bacteriology. In the past 10 or 12 years, Dr. Stine has served as chairman of nearly every cheese committee of the Committee of Government Experts concerning the Code of Principles of Milk and Milk Products.

Testimony by the plaintiff's witnesses established that an enzyme is a protein that works as a catalyst. The enzyme accelerates a reaction without entering into the action or being used up in it. The phrase "enzyme preparation" describes the biological suspension which acts as a carrier for the enzymes. This carrier contains the active agent and usually such other substances as water, sodium chloride, preservatives, bacteria, and other enzymes. An enzyme preparation may be in what is called suspended form, which is a liquid, or it may be in dehydrated form, that is, dried.

According to plaintiff's witnesses, enzymes are sometimes grouped or classified according to their source, but ordinarily they are classified by the function they perform. All five of plaintiff's witnesses testified that because of the function microbial milk-clotting enzymes perform in cheesemaking, they considered such enzymes rennet.

Dr. Sardinas testified that rennet's chief function in cheesemaking is coagulating milk to form a stable curd. The witness explained that coagulation is the result of splitting a bond in the casein. Milk contains casein which colloides in suspension. There are three types of casein, alpha, beta, and kappa. According to Dr. Sardinas:

> * * * the integrity of this casein colloid, the unit referred to as a mycele * * * is guaranteed, as it were, by the kappa casein. The rennet enzyme can split a particular bond. The bond which joins one amino phenylalamine with another amino acid methionine bond is a labile bond. It splits it into two parts. The

> consequence of this action is that the mycele, the colloid, destabilizes, and no one understands completely just why. There are at least three theories trying to explain what goes on in this complexity, but the sum total of the action is that the proteins, the alpha and beta proteins, along with some of the kappa casein, which is now called para-k-casein * * * form a curd which, of course, is insoluble.

Dr. Sardinas noted that there are other enzymes besides rennet which will coagulate milk. However, rennet is different from these enzymes since it will create a stable curd that will maintain its essential character as a curd. The unique quality of rennet for making cheese is that after it has broken the necessary bonds to coagulate milk, it for the most part stops splitting bonds. Dr. Sardinas explained that stronger milk-clotting enzymes, like papain and ficin, continue to digest further, which causes "bad flavors and poor curd consistency."

Dr. Cayle also described the milk-coagulating process in depth. He compared the casein protein to a freight train of 170 amino acids or cars, with one particular, susceptible bond or coupling between the cars/amino acids. The couplings between the cars are all the same, but each car or amino acid is itself different. The coupling or peptide bond which is going to be attacked by the milk-clotting enzyme is the same as the others, but what allows for it to be specifically split is the relationship of the different amino acids to one another. The configuration of the phenylalamine and methionine amino acids causes the enzyme to attack the bond between them at the fastest rate, breaking it, and releasing the kappa-casein portion to bind with calcium and create a stable curd. The rennet enzyme probably breaks other bonds in the amino acid chain, but at a much slower rate. Stronger milk-clotting enzymes will attack other bonds at a much faster rate. Rennet, Dr. Cayle explained, "allows for the formation of the curd by breaking that one bond and then sort of holds back and doesn't do any more damage."

Plaintiff's witnesses cited numerous animal sources of rennet, including calves, cows, lambs, kids, and goats. One witness, Dr. Stine, stated experiments are being performed to test chicken gizzards and thistles as sources of rennet. The witnesess also named three microbial sources of rennet. These microbials, identified by their Latin name, include *Mucor miehei*, *Mucor pusillus*, and *Endothia parasitica*. The Rennilase import presently under consideration is produced from the *Mucor miehei* microbial.

Dr. Sardinas testified that no microbial milk-clotting enzyme preparation worthy of sale had been discovered before 1965. Pfizer produced a milk-clotting enzyme from *Endothia parasitica* in 1967. According to Dr. Stine, microbial milk-clotting enzymes are used to produce about 40 percent of the cheese made in this country, while calf rennet is used for making only about 8 to 12 percent of the country's cheese.

The type of microbial milk-clotting enzyme under consideration is exclusively used for cheesemaking. Plaintiff's witnesses agreed that in the cheese industry, when the word "rennet," which Dr. Kosikowski said comes from a German word meaning "run together," is used by itself, it usually refers only to calf rennet. Other rennets are identified by using the name of their source in front of the word rennet, for example, bovine rennet (from adult cows), kid rennet, etc. Rennilase is the plaintiff's trade name for its enzyme preparation made from *Mucor miehei*. According to the plaintiff's witnesses, in the cheesemaking industry, Rennilase would also be described as microbial rennet or *Mucor miehei* rennet.

Dr. Cayle testified that in 1972 the Food and Drug Administration permitted the phrase "microbial rennet" to be placed on the label of the milk-clotting enzyme preparation that the Wallerstein Co. developed from *Mucor miehei*. Dr. Stine similarly testified that while he was vice president of regulatory compliance at Kraft Co., the microbial milk-clotting enzymes were simply identified as "rennet" on the ingredient clauses of Kraft products.

In response to plaintiff's case, the defendant presented 2 witnesses and 10 exhibits, including the pretrial deposition of a third witness. Appearing for the defendant were a university professor of dairy science and a representative of a corporation which manufactures and sells enzymes. Defendant's third witness is manager of regulatory compliance at a cheesemaking corporation.

Dr. Carl Anthon Ernstrom has been head of the Department of Nutrition and Food Science at Utah State University since 1971 and before that he was a professor of dairy science and head of the Department of Food Science and Industries. His Ph. D. thesis was entitled "A Study on Rennet and Rennin." He has authored 20 publications on milk-clotting enzymes and has done consulting work dealing with milk-clotting enzymes for Chris Hansen's Laboratory, Inc., the Pfizer Co., and the New Zealand Rennet Co.

Mr. Niel Dinesen is vice president of technical operations at Chris Hansen's Laboratory, Inc., which is a manufacturer and supplier of food ingredients, including milk-clotting enzymes. Mr. Dinesen, who has the Danish equivalent of a master's degree in chemistry and chemical engineering, has been employed by Hansen since 1961, doing both research and management work. He has authored five or six papers on milk clotting, and has been a member of the Ad Hoc Enzyme Technical Committee and its rennet subcommittee.

Dr. John H. Nelson, whose testimony was taken at a deposition prior to the trial, is employed by Kraft, Inc., where his responsibilities include insuring compliance of Kraft products with food and drug laws. Prior to his employment with Kraft, Dr. Nelson was associated

with Dairyland Food Laboratories, Inc., in the areas of research and management for 22 years. His Ph. D. is in dairy and food science, and he has published approximately half a dozen articles on milk-clotting enzymes.

Two of defendant's witnesses disagree with plaintiff's witnesses, and to a certain extent with each other, with regard to the definition of rennet. Both feel that plaintiff's definition of rennet is overbroad. Dr. Ernstrom presented a very restricted definition of rennet, more specific than the definition the defendant itself espouses. According to Dr. Ernstrom, the term "rennet" refers only to the enzyme preparation produced from the fourth stomach of milk-fed ruminant animals. Mr. Dinesen's definition of rennet is the same as that of the defendant, namely, enzyme preparations that come from the fourth stomach of ruminant animals and used for curdling milk to make cheese.

Defendant's third witness, Dr. Nelson, did not give a definition of rennet, nor did he consider the classification either in terms of function or ingredients. This witness did, however, testify that he formerly considered milk-curdling microbial enzymes to be rennet. Further, it appears that this change of opinion was a result of the difficulty Dr. Nelson first encountered in trying to convince the FDA to call these enzyme preparations rennet. In his testimony, this witness refers to the import in question as microbial or fungal rennet. Rather than contribute to the defendant's proof, Dr. Nelson's testimony supports the plaintiff's position.

Defendant's attempt to distinguish the microbial enzymes from animal rennet is not convincing. Microbial rennet, according to defendant, does not perform precisely the same function as animal rennet. In addition there are other nonrennet enzymes which perform the same function.

On the question of function, defendant attempts to draw three distinctions between the microbial enzyme and animal rennet. First, microbial milk-clotting enzymes are used for short-hold cheese and have not been shown to produce long-hold cheese very well. Second, the microbial enzymes do not contain rennin. Third, in curdling milk, the microbials break amino acid bonds differently from those broken by animal rennets.

Plaintiff's witnesses agree that the microbial enzymes do not produce long-hold cheese as successfully as does rennet from calves. However, as refutation of defendant's distinction, Mr. Dinesen, defendant's own witness, admitted that other animal rennets, like kid and lamb rennets, are not usually employed in making long-hold cheese either. Similarly, when asked whether kid or lamb rennet contained rennin, Mr. Dinesen testified that he did not know, but that he would still consider milk-clotting enzymes from these animals to be rennet. Nor was it established that goat and sheep rennets broke the same bonds as calf rennet did.

Defendant also contends that microbials should not be classified as rennet based upon function since defendant's witnesses testified that pepsin, also referred to as porcine pepsin, performs the same function but is not a rennet. According to defendant and plaintiff's witnesses, McMullen, Sardinas, Cayle, and Stine, pepsin is a digestive enzyme extracted from pigs' stomachs, and though used in curdling milk to make cheese it is generally not considered rennet in the cheese industry.[2]

However, although pepsin is used to curdle milk, it is not used by itself to do so. Rather it is used in combination with a rennet. Dr. Sardinas described pepsin, as it is used in cheese making, as a diluent for rennet. Defendant's witness Dr. Ernstrom testified that he also had succeeded in making cheese from 100 percent pepsin. There was no dispute between the witnesses as to the fact that cheese is seldom commercially made from 100 percent pepsin.

The parties have agreed that item 437.46 is an eo nomine provision. In customs jurisprudence the meaning of an eo nomine designation is determined as of the date of the statute. However, an eo nomine provision is intended to include all articles subsequently created which fairly come within its scope. *Sears, Roebuck and Co.* v. *United States*, 46 CCPA 79, C.A.D. 701 (1959); *Hoyt, Shepston & Sciaroni, S. Blondheim & Co.* v. *United States*, 52 CCPA 101, C.A.D. 865 (1965). Additionally, an unqualified provision for an article includes such articles made by artificial means. *Christensen Diamond Products Co.* v. *United States*, 54 Cust. Ct. 221, C.D. 2537, 243 F. Supp. 212 (1965), *appeal dismissed*, 53 CCPA 155 (1965).

The meaning of a word in a tariff provision is determined by its common usage, unless it is shown to have a different commercial meaning. *United States* v. *C. J. Tower & Sons*, 48 CCPA 87, C.A.D. 770 (1961). In determining whether an imported article is embraced within an eo nomine designation, use may be considered in order to establish its identity. *United States* v. *Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959).

The court may consult dictionaries, lexicons, scientific authorities, and other reliable sources of information as aids to determine the common meaning of tariff terms. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973). Dictionary definitions support the claim that the meaning of rennet encompasses any enzyme which is used for curdling milk to create cheese, regardless of the enzyme's source. "Webster's New International Dictionary of the English Language" (2d ed. 1960), gives the following definition of rennet:

> rennet, *n.* [ME., fr. *rennen* to run; cf. AS. *gerinnan* to curdles coagulate, E. dial. *run* to curdle. See RUN, *v.*] 1. The content,

[2] Plaintiff's witness Dr. Kosikowski did testify that he would classify pepsin as a rennet when it was used as a rennet.

> of the stomach of an unweaned calf or other animal, or the lining membrane of the stomach (esp. of the fourth stomach of ruminants), used for curdling milk; hence, also, any preparation of the stomach of animals which is used for that purpose. Rennet rapidly loses its properties when heated above 60° C. Rennet extract is usually prepared from the fourth stomach of calves. 2. Anything used to curdle milk. 3. *Biochem.* Rennin.
>
> rennin, *n.* [From rennet.] *Biochem.* An enzyme that coagulates milk. It is found in gastric juice, and also in various lower animals and plants.

Defendant attempted to establish support of its position by legislative history. Defendant's reference to the "Summaries of Trade and Tariff Information" failed to bring to light any support for defendant's interpretation. An excerpt regarding rennet in the most recent summary on this subject strongly supports plaintiff's position. This excerpt is from the 1971 summary, and thus cannot be considered in determining the legislative intent of the provisions being considered. However, the reference is relevant to a determination of the common meaning of the term "rennet" at the time the present import was entered. The relevant portion from the 1971 summary, schedule 4, volume 7, page 64, reads:

> Enzymes are obtained by one of three types of processes: (1) Extraction from animal organs removed at slaughter; (2) extraction from vegetable material; and (3) cultivation of selected bacterial or fungal microorganisms. Examples of the first type of process are rennin and pepsin. *Rennin, or rennet, as the enzyme-containing substance is known commercially, is used as a coagulating agent in the manufacturing of cheese and has been obtained historically from the stomach lining of a young calf.* Pepsin, an enzyme used as a digestive aid and food additive, is obtained from the stomach of a hog. Papain, an example of the second type of process, is derived from the papaya fruit and is used as a meat tenderizer. *A second method for producing rennin, utilizing a fungal organism as an enzyme-producing agent, is an example of the third type of process.* * * * [Italic added.]

Plaintiff has satisfactorily established that Rennilase is a form of rennet, microbial rennet, which has recently been developed. Since an eo nomine provision encompasses all forms of the named item including those subsequently developed, plaintiff has met its burden of proof in overcoming the classification. The rennet prepared from microbial sources is commonly referred to as rennet. The microbials perform the same function as is readily recognized as performed by rennet, curdling milk for cheesemaking. The record establishes that microbial milk-clotting enzymes are used solely for making cheese.

Therefore, upon the evidence of record, the claim for classification under TSUS item 437.46 is sustained. Judgment will be entered accordingly.

(C.D. 4807)

CORNING GLASS WORKS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-8-02008

Machines for Optical Inspection of Ampuls

MACHINES FOR OPTICAL INSPECTION OF AMPULS—LENS NOT USED FOR "SUBSIDIARY PURPOSE"

"Rota" machines for the optical inspection of drug-filled ampuls, incorporating an optical element (viz., a magnifying lens) that must be utilized to make inspections, are "optical instruments" as defined in headnote 3, part 2, schedule 7, TSUS. Since the lens is employed in the Rota's "dominant function" (viz., optical inspection of ampuls), the lens is not used for a "subsidiary purpose" within the intent of headnote 3. *United States* v. *American Machine & Metals, Inc.*, 29 CCPA 137, C.A.D. 183 (1941), distinguished; *United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977), and *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, C.D. 4602 (1975) followed.

SAME—HEADNOTE 3, PART 2, SCHEDULE 7, TSUS

Inasmuch as the purpose of the Rota is optical inspection, its optical element is at least coequal in function to the machine's nonoptical features. Accordingly, the optical element does not serve a "subsidiary purpose" within the intent of headnote 3, part 2, schedule 7.

SAME—OPTICAL ELEMENT NEED NOT BE DOMINANT

To be "optical instruments" as defined in headnote 3, part 2, schedule 7, TSUS, an optical element need not be the most important or dominant feature of the instrument, since "the statutory distinction is between 'subsidiary' and not 'subsidiary'." *United States* v. *Ataka America, Inc.*, 64 CCPA 60, 66, n. 5, C.A.D. 1184 550 F. 2d 33 (1977), and *Parsons Optical Laboratories et al.* v. *United States*, 68 Cust. Ct. 143, 148, n. 1, C.D. 4351 (1972) cited.

STARE DECISIS

Stare decisis is applicable in the absence of a showing of "clear error" in prior decision. *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 103, C.A.D. 737 (1960), and *United States* v. *Mercantil Distribuidora et al.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957). See also an article authored by Chief Judge Re, "STARE DECISIS", presented at a Seminar for Federal Appellate Judges, 79 F.R.D. 509 (1979).

[Judgment for defendant.]

(Decided on remand [C.A.D. 1216] June 18, 1979)

Murray Sklaroff, Esq., for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *John J. Mahon*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: This action is here on remand from the Court of Customs and Patent Appeals in *United States* v. *Corning Glass*

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Works, 66 CCPA—, C.A.D. 1216, 586 F. 2d 822 (1978), which recently reversed the judgment for plaintiff in *Corning Glass Works* v. *United States*, 79 Cust. Ct. 72, C.D. 4716, 448 F. Supp. 262 (1977), reh. denied, 80 Cust. Ct. 22, C.D. 4733 (1978).

This dispute concerns the proper tariff classification for certain "Rota" machines for the optical inspection of ampuls (Rotas) imported from West Germany and entered at the port of New York in December 1973 and June 1974. In liquidation of the entries, Customs assessed duty at the rate of 25 per centum ad valorem under the provision in item 710.90, TSUS, as modified by T.D. 68–9, for "[o]ptical measuring or checking instruments * * *". Corning claims, inter alia, that the Rotas are properly dutiable at the rate of 5 per centum ad valorem under the provision in item 678.50, TSUS, as modified by T.D. 68–9, for "[m]achines not specially provided for * * *".[1]

Background

In C.D. 4716, I held that the Government's classification of the Rotas under item 710.90 was erroneous, since they perform neither a measuring nor checking function within the purview of the statute. Inasmuch as such finding was sufficient to negate the propriety of defendant's classification under item 710.90, it was unnecessary to reach the question of whether the Rotas were "optical instruments", as defined in headnote 3, part 2, schedule 7 (headnote 3). Additionally, I held that there is no other tariff description which more specifically describes the imports than item 678.50, and concluded that the merchandise in issue is properly dutiable under that provision. Plaintiff's other alternative claims were found lacking in merit and dismissed.

In support of its motion for rehearing, defendant contended that whether or not the Rota performs a measuring or checking function, there exists an unrebutted presumption that the Rota is an optical instrument by virtue of its classification under item 710.90, and that such presumption precludes classification under item 678.50, TSUS. On the basis of the asserted presumption, defendant suggested, as illustrative, that the merchandise was more specifically provided for under item 708.89, TSUS, covering "[o]ptical appliances and instruments not provided for elsewhere * * * [o]ther * * *", than under item 678.50.[2] However, defendant failed to assert item 708.89 as an affirmative defense, and expressly disavowed item 708.89 as an alternative classification. Consequently, defendant's motion for rehearing was denied, 80 Cust. Ct. 22, C.D. 4733 (1978).

[1] Plaintiff alternatively claims that the merchandise is properly dutiable under: Item 662.20, providing for parts of "machinery for filling, closing, sealing, capsuling, or labeling bottles, cans, boxes, bags, or other containers", at the rate of 5.5 per centum ad valorem; item 708.85, covering "[h]and magnifiers, magnifying glasses * * * and similar articles", at the rate of 12.5 per centum ad valorem; and item 708.91, covering "[f]rames and mountings, and parts thereof: For the articles provided for in item 708.85", at the rate of 15 per centum ad valorem.

[2] General Interpretative Rule 10(c) requires that an article be classified under the provision which most specifically describes it.

On appeal, the Court of Customs and Patent Appeals, in an opinion by Chief Judge Markey, reversed and held that the Rotas perform a "checking" function within the purview of item 710.90, TSUS, and remanded the case to this court for an initial evaluation of the conflicting testimony concerning whether the magnifying lens serves a "subsidiary purpose" within the purview of headnote 3.

In connection with the remand, this court permitted oral argument (on plaintiff's request) and the submission of supplemental briefs concerning the question of whether the Rotas are "optical instruments" as defined in headnote 3. Plaintiff's motion to amend the complaint for the purpose of interposing a new alternative claim under item 710.80, TSUS, was denied on December 20, 1978. *Cf. Ataka America, Inc.* v. *United States*, 80 Cust. Ct. 132, C.D. 4745 (1978).

For the reasons indicated below, I have determined that the Rotas are classifiable as "optical instruments" as defined in headnote 3, and accordingly judgment must be entered for defendant.

The Record

The record establishes the following pertinent facts:[3]

The Rota, which is described in the manufacturer's promotional literature as a "machine for optical inspection of ampoules", is used by pharmaceutical manufacturers for the optical inspection of sealed ampuls containing injectable drugs. This inspection is intended to discover the presence of any visible contaminants in the drug solution, chars (discoloration of the drug caused by exposure to excessive heat during the sealing of the ampul) and missing labels.

The Rotas operate in the following manner. An input chute accepts the ampuls and presents them to a conveying rod comprised of a bar several feet long with holes. This rod is lowered over the ampuls and moves them horizontally to the operator's field of vision. There, the ampuls are rapidly rotated to set their contents in motion. After a brief high-speed rotation, the motion is stopped while the ampuls' contents continue swirling around, at which time the inspector views them. The purpose of spinning the ampuls is to make any particulate matter more mobile, thus enhancing the visibility of any contamination. Any ampuls that appear upon inspection to be unsatisfactory may be rejected by the inspector by simply depressing a button activating a jet of compressed air that blows the defective ampul off the viewing stage. Rejection occurs within the view of the inspector, thus allowing the inspector to know immediately if the correct reject

[3] The record consists of the oral testimony of one witness for plaintiff and two witnesses for defendant. Plaintiff's witness was David S. Berg, manager of plaintiff's plant in North Bergen, N.J. Defendant's witnesses were: Eugene E. Lakso, president of the Lakso Co., Leominster, Mass., which manufactures, among other equipment, a completely electronic machine for inspecting ampuls; and Eugene J. Kovary, senior supervisor of pharmaceutical engineering for Hoffman La Roche, Inc., Nutley, N.J., 1 of the 10 largest pharmaceutical manufacturers in the world. The record also includes various exhibits offered by the parties, and the official papers, which were offered by plaintiff.

button was pushed. Ampuls that pass inspection are accumulated in a chute at the discharge end of the machine.

The Rota machine per se does not inspect ampuls, but the inspection process depends upon human vision. An essential feature of the Rota machine is a magnifying lens through which the ampuls must be viewed by the operator. The lens is usually of 200 percent magnification, although a 300-percent magnifying lens was also included in the importations as an accessory to be used in lieu of the 200-percent lens. However, the 300-percent magnifying lens was discarded in use because it caused too much distortion.

The lens magnifies the ampuls under inspection so that they appear to be the same size as though the inspector were able to view them at the normal reading distance of 10 inches. Plaintiff's witness stated that, due to the design of the Rota machine, "it's physically impossible to get close enough to the containers to see them" (R. 74).

At the inspection point, the ampuls are viewed against a background that can be varied from light to dark or in polarized light. Additionally, fluorescent and incandescent lights are used at the inspection point in the Rota to illuminate the ampuls. The viewing area of the Rota is hooded to shield out extraneous light and to avoid distraction to the inspector.

Defendant's witness Lakso testified that, while the hardware involved in the conveying, spinning, and rejection features of the Rota is substantial, these features are subordinate to the actual viewing or inspection of the containers, which he said is the primary function of all of the equipment involved. Defendant's witness Kovary similarly testified that inspection is the primary purpose of the Rota, and considered the conveying, spinning, and rejection functions as auxiliary to the inspection.

Opinion

Against this background, we turn to the issue of whether the Rotas meet the statutory definition of "optical instruments", as defined in headnote 3. That headnote reads:

> 3. The term "optical instruments", as used in this part, embraces only instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

The centerpiece of this phase of the case is the term "subsidiary purpose" as used in the headnote. Presumptively, of course, in classifying the merchandise under item 710.90, Customs found that the optical element of the Rota (viz, a magnifying lens)[4] is not used for a "subsidiary purpose". *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, 174, C.D. 4602 (1975).[5]

[4] The term "optical elements" includes lenses. *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 14, C.D. 4668 (1976).

In *Amaco*, a "Strunck" ampul inspection machine "essentially the same as that here involved" (*Corning Glass*, 66 CCPA at—, n. 6), was found to have been correctly classified under item 710.90. There, plaintiff conceded that the inspection performed with the Strunck unit is a "checking" function, and the sole issue was whether the machine is an optical instrument.

Corning maintains that *Amaco* "cannot serve as *stare decisis*, or as any sort of precedent", assertedly because the plaintiff in *Amaco* did not address itself to the optical instruments issue, and also because that case was decided on the basis of plaintiff's failure to overcome the presumption of correctness attaching to the classification (supplemental brief, at 7–8). I disagree.

Although in *Amaco* the plaintiff relied upon "Judicially established criteria" rather than upon headnote 3, the optical instruments issue was vigorously argued by *Amaco*. In that connection, *Amaco* insisted that the lens was not necessary to the operation of the machine, and that the aid provided by the lens was incidental to the function of the machine. Regarding this aspect, Judge Landis observed (74 Cust. Ct. at 178):

> What plaintiff has done is to marshal the facts into an argument that separates the mechanical parts of the imported unit from the optical element in the checking function. While the imported unit will undoubtedly mechanically operate without the optical element, the checking function cannot, or at least there is no proof that it is, completed by the operator without the assistance of the incorporated optical element or a substitute device.

It is evident from the court's opinion in *Amaco* that notwithstanding the plaintiff's reliance on judicially established criteria, the underpinning for the court's decision was plaintiff's failure to sustain its burden of proof under the statutory definition of "optical instruments" in headnote 3. Thus, Judge Landis held that "[p]resumptively the optical element is incorporated for a purpose that is not subsidiary to the checking function", and concluded that plaintiff had failed to overcome that presumption.

Here, Corning has failed to show "clear error" in the *Amaco* decision, and therefore the salutary doctrine of *stare decisis* applies. *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 103, C.A.D. 737 (1960); *United States* v. *Mercantil Distribuidora et al.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957). In an article entitled "Stare Decisis", presented at a Seminar for Federal Appellate Judges, Chief Judge Re observed (79 F.R.D. 509 (1979)):

> Basic to our discussion is the understanding that, in the common law world, a judicial decision serves a dual function.

[4] Plaintiff has persistently contended throughout this litigation that there is no presumption of correctness attaching to the classification under item 710.90 because the Government did not designate under which term, "measuring" or "checking", the classification was made. However, irrespective of whether Customs classified the Rotas as "measuring" or as "checking" instruments, the classifying officer must be presumed to have found that they were "optical instruments" since such finding was required for either classification. *Cf. Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966).

> First, it settles the controversy, that is, under the doctrine of *res judicata* the parties may not relitigate the issues that have been decided. Second, in the common law system, under the doctrine of *stare decisis*, the judicial decision also has precedential value. The doctrine, from *stare decisis et non quieta movere*, "stand by the decision and do not disturb what is settled," is rooted in the common law policy that a principle of law deduced from a judicial decision will be considered and applied in the determination of a future similar case. In essence, this policy refers to the likelihood that a similar or like case arising in the future will be decided in the same way.

Significantly too, *Amaco* was cited with approval by the Court of Customs and Patent Appeals in *United States* v. *Ataka America, Inc.*, 64 CCPA 60, 65, n. 4, C.A.D. 1184, 550 F. 2d 33 (1977), respecting the controlling effect of headnote 3 in the classification of articles as "optical instruments". Additionally, *Amaco* was cited by Judge Maletz in *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 13, C.D. 4668 (1976) in connection with the statutory definition of "optical instruments".

Although involving different merchandise than that now before us, the rationale of *Ataka* is apposite. In *Ataka*, the issue was whether certain fiberscopes were properly classified in liquidation under item 709.05, TSUS, as "Other" optical instruments, or were properly dutiable under item 709.17, TSUS, as "Other" electro-medical apparatus, as claimed by the importer. The fiberscopes, in addition to their optical function employed in examining certain internal portions of a patient, possessed the functions of enabling the performance of biopsies, cytologies, and photography.

Chief Judge Markey writing for the Appellate Court in *Ataka*, reviewed the requirements for "optical instruments", as defined in headnote 3, and the various criteria developed by "existing customs practice", as summarized in *Engis Equipment Company* v. *United States*, 62 Cust. Ct. 29, C.D. 3670, 294 F. Supp. 964 (1969). After holding that the *Engis* criteria are not determinative in every case, but are useful in determining the statutory meaning of "optical instruments",[6] the Appellate Court noted (64 CCPA at 66):

> * * * Broadly, therefore we conclude that the term "optical instrument(s)" encompasses devices which act upon or interact with light, which permit or enhance human vision through the

[6] In *Ataka*, the Appellate Court held that "[T]he *Engis* criteria, though neither controlling nor exhaustive, do provide an appropriate compendium of 'optical instrument' characteristics". 64 CCPA at 65, n. 4. In *Engis*, the Customs Court found the following characteristics necessary to qualify a device as an "optical measuring instrument" (62 Cust. Ct. at 32):

> * * * First, the device must function in such manner that employment of its optical features is dominant or primary, as compared to the role of its other components. * * * Second, the device's optical elements must be essential to its operation; that is, to be considered an optical measuring instrument, the device cannot be operated in its intended manner without the optical components. * * * Third, optical measuring instruments must, in performing their intended function of measurement, act upon, deal with, or route rays of light. This interaction between light and such optical elements as lenses, prisms and mirrors normally manifests itself in divergence, convergence, reflection, refraction, polarization, or merely conveyance of light rays. * * * Finally, the optical system of the instrument must aid human vision or create for inspection a picture or image of some object. [Citations omitted.]

use of one or more optical elements, and in light of headnote 3, which utilize the optical properties of the device in something beyond a "subsidiary" capacity. See *United States* v. *American Machine & Metals, Inc.*, 29 CCPA 137, C.A.D. 183 (1941).

Further, the Appellate Court pointed out that under headnote 3, the issue is not whether the optical element is "subsidiary" or "dominant", but rather "the statutory distinction is between 'subsidiary' and not 'subsidiary' " (64 CCPA at 66, n. 5).

Ataka had argued that the optical features of the fiberscopes acted in a subsidiary capacity to the biopsy-cytology functions, thereby excluding the merchandise from classification as "optical instruments" pursuant to headnote 3. Addressing the claimed subsidiary character of the optical features of the fiberscope, Chief Judge Markey commented (64 CCPA at 67):

> It remains to be determined whether, as Ataka argues, the optical features of the instrument act in a subsidiary capacity to the biopsy-cytology functions, thereby excluding the fiberscopes from classification as "optical instruments," pursuant to headnote 3.
>
> Testimony adduced at trial established that visualization is essential in the performance of biopsies and cytologies with the imported fiberscope. Ataka's argument that, in the performance of biopsies and cytologies, the optical function is subsidiary to the biopsy-cytology operation, though supported in part by the opinion testimony of one witness, is without merit. The imported device must be considered as a whole. Whether a feature be dominant or subsidiary cannot be determined by isolating a particular employment of the device. The use frequency of the biopsy and cytology capabilities of the fiberscopes varied from physician to physician and from hospital to hospital. It was undisputed, however, that all who used the instrument, for any p urpose, used it to *view* the interior of a body organ. Depending upon the situation, that visual operation may be all that is performed. It is only after visual examination that a decision to take a biopsy or cytology specimen can be made.
>
> To term optical features merely subsidiary to biopsy-cytology features, when the latter *require* the former, and when the latter are not always used and the former are always used, would be contrary to reason. Accordingly, we hold the imported fiberscopes meet the definition of "optical instruments" in headnote 3. * * *

Here, as in *Ataka*, plaintiff posits that the optical element of the merchandise is subsidiary to its nonoptical features. Hence, the thrust of Corning's argument is that "in the overall purpose for which mechanical inspection machines are designed, any enhancement of vision *is at most subsidiary* to the main purpose of the machine, that is, pacing, speed-up, uniformity of the entire inspection process, which, in turn, is one step in producing a saleable ampul" (supplemental brief, at 4). [Plaintiff's italic.] There is no merit in this argument.

The record is clear that the purpose of utilizing the Rota is for the visual inspection of ampuls. The conveying feature merely brings the

ampuls to the inspection point; the spinning feature serves only the purpose of making the presence of particulate matter more readily visible during inspection; and it is only *after visual inspection* of the ampul that a decision can be made by the operator to pass the ampul as saleable or reject it.[7] As noted by our Appellate Court in *Ataka* (64 CCPA at 67), "[d]epending upon the situation, [a] visual operation may be all that is performed. It is only after visual examination that a decision to take a biopsy or cytology specimen can be made."

Indeed, the Rota itself is so designed that the only way the ampuls can be properly seen during normal operation is through the lens. On this score, plaintiff's witness Berg explained that due to the design of the machine, the inspector's head is located about 22 to 24 inches away from the point where the containers are on the stage, and then testified on direct examination (R. 30):

> * * * From that distance, *without the lens, you would not be able to see the detail necessary to do the job.* So, the lens is introduced to make the containers appear about the way they would appear if you were looking at them close up in your hand. [Italic added.]

And on cross-examination Berg admitted (R. 70–71):

> Q. Did you testify that the lens was necessary for the inspection machines to function as they are intended?
> A. As it is intended—it is necessary.
>
> Q. And is the function of the lens to put the ampul—by means of magnification—in a position where it would be the same size as if it were to be held by the operator, in his hand, close to his face?
> A. That was the point I was trying to make—yes—that, because the lens is there, you are then able to see these containers—which is at some distance from you—as if you were holding it at normal viewing distance.
>
> Q. *So, the result of the magnification of the ampul allows the successful operation of the machine?*
> A. *Yes.* [Italic added.]

Further, defendant's witness Lasko opined that the conveying, spinning, and rejection functions are subordinate to the inspection operation itself, which is the primary function of the Rota.

In short, the conveying, spinning, and rejection features of the Rota are intimately related to the viewing of the ampuls for inspection purposes, which must be performed with the aid of the magnifying lens. Paraphrasing, *Ataka*, it is undisputed that all who used the Rota used it to *view* ampuls and their contents. Since optical inspection of ampuls is the function of the Rota, and visualization must be accom-

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[7] The rejection function is performed in the operator's view so that the operator can verify that the defective ampul has been rejected.

plished by means of its optical element, the optical element plainly does not serve a "subsidiary purpose" under the rationale of *Ataka*.

Plaintiff attempts to equate the function of the Rota's lens with an optical element used merely for viewing a scale. In support of that argument, plaintiff relies on *United States* v. *American Machine & Metals, Inc.*, 29 CCPA 137, C.A.D. 183 (1941). There, a machine used for testing the hardness of metals operated by first indenting the metal to be tested (utilizing nonoptical apparatus), and thereafter a microscope was employed to measure the previously—and independently—made indentation, which indicated the hardness of the metal. The Court of Customs and Patent Appeals held that the hardness testing machines were not optical measuring or optical testing instruments, observing (29 CCPA at 143–44):

> So, while the articles here involved each contains a microscope which is used to measure an indentation made by the articles, such measurement is not the dominant or primary function for which the article is designed. The microscope is used to measure an indentation upon the metal made by the article itself, at a predetermined load.
>
> * * * * * * * * * In our opinion an article cannot be classified as an optical measuring or optical testing instrument unless the dominant or primary use of the article lies in the employment of its optical features. Therefore, since it cannot be said that the dominant or primary use of the article here involved lies in the employment of the microscope, we hold that such article is not an optical measuring or optical testing instrument classifiable under paragraph 228(a). [Italic in original.]

But *American Machine* is readily distinguishable from the present case.

First, it is noted that the *American Machine* decision predates the TSUS, and consequently does not specifically address the phrase "subsidiary purpose" in headnote 3, with which we must now deal.

Second, *American Machine* is distinguishable on its facts. The dominant or primary function of the device in *American Machine* was to make an indentation in the metal being tested for hardness. The optical element (viz, a microscope) was used merely to measure the results of the test, but played no role in the machine's denting function. By contrast, the Rota's primary function is the optical inspection of ampuls, and the magnifying lens concededly must be employed to perform such function. The fact that the Rota incorporates nonoptical apparatus to mechanize and pace the inspection process does not alter the fact that the machine's function is optical inspection. Since the Rota's sole purpose is optical inspection, its optical element is obviously at least coequal in function to the machine's nonoptical

features. Accordingly, the Rota is not analogous to the denting device in *American Machine*, wherein the microscope was used merely to obtain a readout or measurement of the results achieved independently by the nonoptical features of the machine.

Although *American Machine* teaches that an article cannot be classified as an optical instrument unless the dominant or primary use of the article lies in the employment of its optical features, it must be recognized that the optical element itself need not be the most important or dominant element of the instrument. As held in *Ataka*, "the statutory distinction is between 'subsidiary' and not 'subsidiary' " (64 CCPA at 66, n. 5). See also, *Parsons Optical Laboratories et al.* v. *United States*, 68 Cust. Ct. 143, 148, n. 1, C.D. 4351 (1972). To reiterate, the Rota's magnifying lens is functionally at least coequal to the conveying, spinning, and rejection features and not "subsidiary". Therefore, I am unable to agree with plaintiff's argument that the lens serves a "subsidiary purpose" because the machine would be inoperative if there were a failure of the conveying, spinning, or rejection features. Doubtlessly, even a disruption of electrical power could incapacitate the entire machine, but that fact hardly demonstrates that any particular component serves a subsidiary purpose.[8]

I find equally untenable plaintiff's argument that the Rota's lens serves a subsidiary purpose since ampul inspection may be accomplished manually without an optical instrument, or by an electronic machine utilizing a television camera rather than human vision. The plain fact remains that it is the Rota that is before the court for classification, and it is undisputed that the mechanical method of optical inspection employed by the Rota necessitates the use of the magnifying lens.

In sum, the arguments advanced by plaintiff have failed to establish satisfactorily that the rationale of *Ataka* is inapplicable here, or that the *Amaco* decision should not be followed. Consequently, I find that plaintiff has failed to overcome the presumption that the magnifying lens of the Rota does not serve a "subsidiary purpose", and that the Rotas are "optical instruments" as defined in headnote 3.[9] Inasmuch as our Appellate Court has determined that the Rota performs a "checking" function within the purview of the superior heading to item 710.90, TSUS, I must ineluctably conclude that the merchandise

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[8] Plaintiff's argument is analogous to saying that an engine or transmission serves a subsidiary purpose in an automobile because the automobile would be inoperative if the battery failed.

[9] Defendant argues that the Rota's polarizing screen, as well as its lens, constitutes the Rota an optical instrument. However, the Court of Customs and Patent Appeals remanded this case with reference to the function of the lens only. In any event, in view of the conclusion reached, it is unnecessary to address defendant's argument respecting the polarizing screen, since under headnote 3, one nonsubsidiary optical element is sufficient to classify an article as an optical instrument.

was properly classified by the regional commissioner of customs under item 710.90, TSUS. This action, therefore, is dismissed.

Judgment will be entered accordingly.

(C.D. 4808)

DAVID E. PORTER, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-6-01448

Seats for rapid transit cars—Furniture—Parts for rail vehicles

SUMMARY JUDGMENT

On motions for summary judgment filed pursuant to rule 8.2, where the parties agree as to the material facts in the case and the court concurs that no genuine issue of facts exists, a summary judgment should be rendered in favor of the party entitled thereto.

DEFINITION—"FURNITURE"

The scope of the tariff provisions concerning "furniture" is strictly delimited by the headnote defining furniture. *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972); *Karoware, Inc.* v. *United States*, 77 Cust. Ct. 112, C.D. 4681, 427 F. Supp. 402 (1976), *aff'd*, 65 CCPA 1, C.A.D. 1197, 564 F. 2d 77 (1977); *Abbey Rents* v. *United States*, 79 Cust. Ct. 103, C.D. 4720, 442 F. Supp. 540 (1977), *aff'd*, 66 CCPA —, C.A.D. 1213, 585 F. 2d 501 (1978).

As the merchandise involved in this case, Bay Area Rapid Transit seats, is "fixed to the wall", the statutory definition of furniture is satisfied.

"PARTS"

"Parts" is a word of art in customs law. The nature, function and purpose of the BART seats conclusively show they are parts of the rail vehicles or cars.

"RELATIVELY MORE SPECIFIC"

"[A]n imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it". General Interpretative Rule 10(c). Thus, these BART seats should be classified as parts of rail vehicles or cars under TSUS item 690.40.

[Plaintiff's motion for summary judgment granted: defendant's cross-motion for summary judgment denied.]

(Dated June 22, 1979)

Arter Hadden & Hemmendinger (*Noel Hemmendinger* and *Barry E. Cohen* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Madeline B. Cohen*, trial attorney), for the defendant.

LANDIS, Judge: This classification case arises on cross-motions[8] by the parties for summary judgment filed pursuant to rule 8.2.

Defendant has stated in its brief that "it concurs with plaintiff's statement of material facts" and it appearing to the court that no genuine issue exists as to any material fact, a summary judgment should be rendered in favor of the party entitled thereto upon the question of law raised by the parties.

The merchandise in issue is transverse [1] rapid transit seats used exclusively in San Francisco Bay Area Rapid Transit (BART) rail vehicles. The seats were classified under TSUS item 727.55, schedule 7, part 4, subpart A:

	Furniture, and parts thereof, not specially provided for:	
	* * * * * * *	
727.55	Other	10% ad val.

Plaintiff claims the merchandise is properly classifiable as parts of rail vehicles or cars under TSUS item 690.40, schedule 6, part 6, subpart A, at the rate of 5.5 per centum ad valorem.

Based upon the reasoning below, it is the court's determination that plaintiff should prevail and the defendant should not prevail.

The merchandise has no other use aside from its utilization in BART trains. The seats are designed to be permanently bolted to the sides of the host vehicles and, once in place, become integral parts of the vehicles.

Three issues are presented: (A) Is the merchandise "furniture"? (B) Is the merchandise part of a railcar or vehicle? (C) If the merchandise is both furniture and part of a railcar or vehicle, which provision controls?

(A) Is the merchandise "furniture" within the meaning of TSUS item 727.55?

The scope of the tariff provisions concerning "furniture" is strictly delimited by the headnote defining furniture.[2] *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972); *Karoware, Inc.* v. *United States*, 77 Cust. Ct. 112, C.D. 4681 427 F. Supp. 402 (1976), *aff'd*, 65 CCPA 1, C.A.D. 1197, 564 F.2d 77 (1977); *Abbey Rents* v. *United States*, 79 Cust. Ct. 103, C.D. 4720, 442 F. Supp. 540 (1977) *aff'd*, 66 CCPA —, C.A.D. 1213, 585 F. 2d 501 (1978).

That headnote reads:

Subpart A headnote:

1. For the purposes of this subpart, the term *"furniture"* includes movable articles of utility, designed to be placed on the floor or ground, and used to equip dwellings, offices, restaurants, libraries, schools, churches, hospitals, or other establishments,

[1] Transverse seats are mounted at right angles to the direction of the vehicle's travel.

[2] *Tariff Classification Study*, schedule 7, Nov. 15, 1960, p. 242:
The concept of furniture embraced in this subpart is stated as a definition in headnote 1.* * *

> aircraft, vessels, vehicles, or other means of transport, gardens, patios, parks, or similar outdoor places, even though such articles are designed to be screwed, bolted, or otherwise fixed in place on the floor or ground; and kitchen cabinets and similar cupboards, seats and beds, and sectional bookcases and similar sectional furniture, even though designed to be fixed to the wall or to stand one on the other * * *. [Schedule 7, part 4.]

The litigants press different portions of the definition. Plaintiff emphasizes that the BART seats are not "designed to be placed on the floor or ground", but rather on the sides of the vehicle. Defendant counters that these are "seats * * * designed to be fixed to the wall." Some recent cases help resolve the issue.

In *Morris Friedman*, *supra*, the dutiable status of rattan hanging chairs was in issue. The chairs were classified as "articles not specially provided for, of unspun fibrous vegetable materials: Of * * * rattan"; plaintiff argued that the merchandise was "furniture". The rattan chairs were basket-shaped chairs, without any legs or base, which hung from a chain and spring suspended either from the ceiling or a post extending from the wall. The court concluded:

> * * * we find * * * that the hanging chairs in question do not come within the purview of the headnote since they are not designed to be placed on the floor or ground or to be fixed to the wall. [69 Cust. Ct. 190.]

By contrast, the BART seats involved here *are* fixed to the wall, the sides of the vehicle. Similarly, in *Karoware, Inc.* v. *United States*, *supra*, which involved the classification of wine racks and bars, the court wrote: "To fall within the headnote definition, an article must be designed to be placed on the floor or ground, or to be fixed to the wall, or to stand on another article of sectional furniture" and "[f]or the bars to fall within the headnote definition, therefore, they must be constructed to be fixed to the wall, a requirement that connotes more than the ability to be merely hung on a wall." (65 CCPA 8.)

Also, in *Abbey Rents* v. *United States*, *supra*, which involved the classification of motorized wheelchairs, this court stated:

> To cut short the obvious, therefore, motorized wheelchairs are not ordinarily used to equip any of the places enumerated in the definition. What they are designed for, as all the witnesses testified, are people, disabled people who, for whatever reason, have very limited or severe involvement in the lower extremities and in the upper extremities to an extent that they cannot propel the hand rims on a standard self-propelled wheelchair. (R. 46). Defendant's statement that given the design and speed limitations of the imported motorized wheelchairs they must be and are used within the structures and limited areas surrounding the structures set forth in the TSUS definition of "furniture" does not, as it is meant to suggest, establish that they are used to equip the places described in the definition. [79 Cust. Ct. 106.]

The court of appeals unanimously affirmed, stating in an opinion by Judge Baldwin:

> * * * we find no reversible error in the decision and opinion of Judge Landis and adopt it as our own with the following additional comments.
>
> The appellant's contention that motorized wheelchairs are encompassed within the definition of furniture set forth in TSUS schedule 7, part 4, subpart A, headnote 1 must fail because the testimony in the record establishes that motorized wheelchairs serve as a means of mobility for individuals with upper and lower body disabilities. Mr. Burrer, a Government witness and himself a user of a motorized wheelchair, testified that he uses his motorized wheelchair as a vehicle for getting from one point to another. Further, no evidence presented established use of a motorized wheelchair solely as an article of furniture to the exclusion of its primary, mobility function. [66 CCPA —.]

As noted, the BART seats in the case at bar are specifically constructed to be fixed to the wall.

Thus, although *Karoware*, *Morris Friedman*, and *Abbey Rents* hold that the merchandise there involved did not constitute "furniture," the discussion in those cases demonstrates that the BART seats do fall within the statutory definition,[3] if not preempted by another provision.

(B) Is the merchandise part of a rail vehicle within the meaning of TSUS item 690.40?

Plaintiff urges that the BART seats are parts of rail vehicles or cars. Defendant concedes this to be the case preferring to save its attack to argue the relative specificity of the two tariff schedule items in issue. Thus an extended discussion is not needed here since both sides agree the merchandise is part of a rail vehicle or car.

" 'Parts' is a word of art in customs law." *Vilem B. Haan et al.* v. *United States*, 67 Cust. Ct. 104, 112, C.D. 4260, 332 F. Supp. 182 (1971); *Vilem B. Haan* reviews many "parts" cases. One of those reviewed is *Mattel, Inc.* v. *United States*, 61 Cust. Ct. 75, 86, C.D. 3531, 287 F. Supp. 999 (1968), in which this court stated:

> [I]t is the nature, function, and purpose of the item in relation to the article to which it is attached or designed to serve which determines whether the item is a "part" of the article for tariff purposes.

[3] Another case which leads to the same conclusion is *Albert E. Price, Inc.* v. *United States*, 60 CCPA 127, C.A.D. 1095, 476 F. 2d 1354 (1973). There certain spice cabinets had been classified under TSUS item 206.97 as "Household utensils and parts thereof, all the foregoing not specially provided for, of wood: * * * Other". The appellant claimed the merchandise should have been classified as "Furniture and parts thereof, not specially provided for: * * * Of wood: * * * Other: Furniture other than chairs" under TSUS item 727.35. In discussing the relevant headnote, the Court of Customs and Patent Appeals approvingly quoted the Customs Court as follows:

> * * * the headnote discussion of furniture was, on its face, intended to certify the inclusion of furniture which was permanently fastened to the premises, either on the floor *or on the walls*, as opposed to furniture which was movable at will. * * * [Italics added.] [60 CCPA 129.]

The "nature, function, and purpose" of these BART seats conclusively show that they are parts of the rail vehicle. The seats are specially designed for the BART cars and are incapable of being used for any other purpose. The seats cannot even be used as seats independent of the BART car. Once installed, the seats become an integral part of the vehicle. Finally, BART is incapable of functioning as intended without the seats.

(C) If both the claimed and assessed provisions describe the merchandise, which provision prevails?

There exists a statutory presumption that the classification by the Customs Service is correct. 28 U.S.C. 2635(a). However, it is noted that General Interpretative Rule 10(c) provides: "[A]n imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it."

And while according to General Interpretative Rule 10(ij) a parts provision does not prevail over a specific provision for the parts, this general rule is inapplicable whereas here we have a parts provision—"parts of rail vehicles" and an n.s.p.f. provision—"furniture not specially provided for". A "parts" provision prevails over a "not specially provided for" provision for articles. "Tariff Classification Study, Seventh Supplement Report" at 99, U.S. Tariff Commission, 1963. This is confirmed by case law: "* * * as is made plain by the legislative history, the intent of general headnote 10(ij) is that a provision for 'parts' is to be deemed more specific than a provision for 'articles, not specially provided for,' and therefore prevails over such a 'basket' provision." *J. E. Bernard & Co., Inc.* v. *United States*, 62 Cust. Ct. 536, 541, C.D. 3822, 299 F. Supp. 1129 (1969), *aff'd*, 58 CCPA 91, C.A.D. 1009 (1971). See also *J. E. Bernard & Co., Inc.* v. *United States*, 59 Cust. Ct. 31, 35, C.D. 3060 (1967).

On its face, item 727.55 is a basket provision—"Furniture, and parts thereof, *not specially provided for*". Furthermore, the U.S. Tariff Commission specifically declares that item 727.55 is a basket provision. *Tariff Classification Study*, schedule 7, page 243 (1960).

In *Sankyodai Corp.* v. *United States*, 62 Cust. Ct. 630, C.D. 3837 (1969), the court considered the classification of wooden seats imported for use in certain plastic boats manufactured here. The merchandise had been classified as parts of yachts; the claim was for furniture of wood, not specially provided for, other than chairs. The court held that the furniture provision was "residual"—"It is residual because of the presence in the superior heading of a 'not specially provided for' clause." Id., 633. According to the court in an opinion by Judge Richardson:

> Since plaintiff has, at the very outset, conceded that the imported merchandise constitutes dedicated parts of a boat, and

since classification of such merchandise was made under a specific tariff provision for parts of yachts or pleasure boats in which category the involved parts fall, classification of this merchandise under a *residual* provision is preempted as a matter of law. *United States* v. *Lansen-Naeve Corp.*, 44 CCPA 31, C.A.D. 632 (1957). *Accord, Arthur J. Humphreys, Packard-Bell Electronics* v. *United States* [59 Cust. Ct. 231, C.D. 3128, 272 F. Supp. 951 (1967), *aff'd*, 56 CCPA 67, C.A.D. 956 (1969)], *supra*. * * * [Italics quoted.] Id., 633.] [4]

Under the same reasoning, these BART seats should be classified as parts of rail vehicles or cars under TSUS item 690.40.

Plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

(C.D. 4809)

JOSEPH F. HENDRIX A/C PRODUCTOS DESHIDRATADOS DE MEXICO, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-12-02655

Animal Feeds

Marigold meal classified as ingredients for animal feeds under item 184.75, Tariff Schedules of the United States, *held* properly subject to classification as products of vegetable origin chiefly used for coloring, crude or processed, under item 470.80, Tariff Schedules of the United States.

Exclusionary headnote 1(a) of schedule 1, part 15, subpart C, Tariff Schedules of the United States, requires plaintiff to establish that the imported merchandise falls within the scope of the claimed provision. *Enrique Garza* v. *United States*, 66 Cust. Ct. 212, C.D. 4192 (1971).

The statutory terms, "including dyeing and staining," are not words of limitation, but words of extension. *Heemsoth & Basse et al.* v. *United States*, 24 CCPA 208, T.D. 48657 (1936).

The addition of an antioxidant, ethoxyquin, does not constitute additional processing within the meaning of headnote 2(a), schedule 4, part 9, subpart A, which would remove the marigold meal from the term, "crude or processed."

[Judgment for plaintiff.]

(Decided June 22,1979)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* of counsel) for plaintiff.

[4] The case of *Parts Manufacturing Associates, Inc.* v. *United States*, 73 Cust. Ct. 42, C.D. 4552 (1974), decided by the Customs Court, but not appealed, is to be distinguished by the fact that the court there pointed out at p. 48 that the headnote defining "furniture" (headnote 1, subpart A, pt. 4, schedule 7) includes the word "aircraft", whereas it should be noted there is no mention therein of rail vehicles or cars. There has been no showing of any specific congressional intent to include rail vehicles or cars under this headnote definition.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *Susan Handler-Menahem*, trial attorney), for the defendant.

FORD, Judge: In this action plaintiff contests the assessment of duty at 7.5 per centum ad valorem on certain marigold meal which was classified by the Customs Service as other animal feeds and ingredients therefor, not specially provided for, under item 184.75, Tariff Schedules of the United States, as modified by T.D. 68–9.

Plaintiff contends said merchandise is entitled to entry free of duty under the provision of item 470.80, Tariff Schedules of the United States, as crude or processed products of vegetable orgin used chiefly for coloring. Alternatively, plaintiff contends the imported marigold meal is subject to duty at 4 per centum ad valorem as other products of vegetable origin used chiefly for coloring under item 470.85, Tariff Schedules of the United States, as modified by T.D. 68–9.

The pertinent statutory provisions involved provide as follows:

Schedule 1, part 15, TSUS:

Subpart C.—Animal Feeds

Subpart C headnotes:

1. For the purposes of this subpart—
   (a) the term "animal feeds, and ingredients therefor" embraces products chiefly used as food for animals, or chiefly used as ingredients in such food, respectively, but such term does not include any product provided for in schedule 4 (except part 2E thereof) or schedule 5 (except part 1K thereof);

* * * * * * *

Animal feeds, and ingredients therefor, not specially provided for:		
* * * * * * *		
184.75	Other	7.5% ad val.

Schedule 4, part 9, TSUS:

Subpart A.—Dyeing and Tanning Products

Subpart A headnotes:

1. This subpart covers only materials, extracts, decoctions, and other preparations suitable for coloring (including dyeing and staining) or for tanning. All the products provided for are of vegetable

origin except cochineal (item 470.05) which is of animal origin.

2. For the purposes of this subpart—

(a) the term "crude or processed" means materials which are crude or which have been processed by shredding, grinding, chipping, crushing, or any similar process, but not otherwise processed;

* * * * * * *

	Products of vegetable origin used chiefly for coloring or tanning, not specially provided for:	
470.80	Crude or processed	Free
470.85	Other	4% ad val.

The record consists of the testimony of four witnesses called on behalf of plaintiff and the receipt in evidence of eight exhibits. Defendant offered the testimony of one witness. In addition, the official court papers were moved into evidence without being marked.

Mr. Herbert Spaul, the sales and production coordinator of Mountaire Feeds, Inc., the consignee of the merchandise at issue testified that the firm deals in poultry feed. The customers of his firm are primarily located in Arkansas, Alabama, and Texas. Mr. Spaul testified that they purchased marigold meal for pigmenting the tissue of chickens and the yolks of the eggs. Marigold meal according to witness Spaul is sold by its xanthophyll content which determines its price. Besides marigold meal, corn is also used by poultry feeders for its natural xanthophyll. Two to three pounds of marigold meal are ordinarily added to 1 ton of feed.

The witness testified that he had not seen the effect of marigold meal on chickens nor had he conducted any tests. Mountaire first used marigold meal in 1968. Prior to that time, corn, alfalfa, and grain products were the primary sources for xanthophyll. Corn and alfalfa both have food value whereas marigold meal is solely used for color pigmentation.

Plaintiff then called Dr. Javier Loustaunau, the director of research and development of Productos de Mexico the producer of the marigold meal involved herein. The witness received his bachelor of science degree from Monterey Institute of Technology in biochemical conditioning, a master of science from Louisiana State University in food science and technology, and a Ph. D. from Louisiana State University in food science. The witness testified that the merchandise at issue is tested and certified for its xanthophyll content. It is this content which determines the value of the marigold meal.

Dr. Loustaunau described the process by which the marigold meal was produced. The marigold flowers are picked by hand and placed on

continuous feeder machines which have a cutter at the end. The cutter separates the petals from the calyx and seeds. The petals are then dried which preserves the xanthophyll content by eliminating the moisture. The drying also reduces the bulk to about 8 percent of its original size. They are then screened and ground to the size of the merchandise contained in exhibit 2. After grinding, an antioxidant known as ethoxyquin is added to retard the oxidation of the xanthophyll content. After this processing it is in condition to be added directly to the feed. The ethoxyquin extends the life of the marigold meal since the shelf life of the product depends upon storage conditions such as temperature, light, and moisture. The product, according to the witness, is sold only to people in the poultry industry.

Mr. Perry F. Twining, consulting poultry nutritionist, employed by Research and Consulting Associates, Inc., testified on behalf of plaintiff. Mr. Twining's experience in poultry feed and nutrition dates back to 1949 when he was employed as a poultry specialist by the University of Maryland. The witness' duty as a consultant include the responsibility for the nutritional program of a poultry company and the evaluations of components and drugs.

Witness Twining testified he was familiar with marigold meal and its relationship to poultry feed. The pigmentation of the skin of a chicken and the color of the yolk of an egg is a significant factor of marketing in various parts of the United States. In the New England States, Maryland, Delaware, and Virginia, there is a preference for pigmented chickens. The geographical preference for pigmented or nonpigmented poultry developed historically. In South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas, and Texas, little attention is given to the pigmentation of poultry.

Mr. Twining has conducted tests in evaluating the availability of xanthophyll from various sources. Xanthophyll is a naturally occurring chemical which acts as a pigment in certain vegetables as well as in the tissue of the bird and the yolks of the eggs. Marigold meal is formulated into poultry feed by use of a computer, the amount of which varies from one-half pound to 3 pounds per ton of feed. According to the witness, marigold meal is used only for coloring the tissue of the chicken and the yolks of eggs. Other commercial substances which contain xanthophyll are corn, gluten meal, grasses, alfalfa, leaf meal, blue grass, and Bermuda grass. Historically, chickens received their yellow color from grass and corn found while wandering around the barnyard. Corn is still used as a source of xanthophyll but also fulfills some of the chicken's nutritional needs. Marigold meal has no value other than its xanthophyll content.

The pigment of xanthophyll is a fat soluble compound and is associated with the absorption of fats. It is transported to the tissue

of the poultry and the yolks of the eggs with the fats that are in the feed. The feed, therefore, acts as a vehicle by which the xanthophyll is transmitted to the poultry.

Plaintiff's final witness was Mr. Hobart R. Halloran, president of Halloran Research Farm, Inc., whose business deals with poultry nutrition and feed. His duties as a poultry nutritionist are to formulate feeds and feeding schedules which are economical and which produce the best possible poultry. Witness Halloran is familiar with marigold meal and testified that its most important constituent was its xanthophyll content. Mr. Halloran explained that xanthophyll was also a pigment which is absorbed intact by the chicken and transported in the blood stream to the fatty tissue of the skin and to the yolks of the eggs. The consumer demand for pigmented chickens necessitates the use of marigold meal, particularly in California where the demand is for a highly pigmented chicken. The only reason marigold meal is added to the poultry feed is to impart color to the chicken and the yolks of eggs. Mr. Halloran recommends the use of marigold meal only when there is a pigmentation requirement and when it economically fits into the formula. To his knowledge, there is no other use for marigold meal.

With the use of ethoxyquin, the oxidation of xanthophyll is not a commercial problem since it has a loss of 10 percent a year under good storage conditions. Without ethoxyquin, there is a loss of 20 to 25 percent per year.

Mr. Halloran testified in rebuttal that the Roche yolk color fan shown on page 21 of exhibit 4 is used to evaluate yolk color and body color of broilers as a standard reference. To his knowledge the color index is not used as a guide by the poultry industry.

Defendant called Mr. George M. Swartswalder, an employee of Allied Chemical Corp. The witness received a bachelor of science degree in chemical engineering and for 9 years was assistant production manager of a firm producing synthetic dyestuffs. The witness was employed by General Foods for 5 years studying certified food colors. For the past 12 years he has been employed by Allied Chemical Corp. in a variety of positions. Since 1968, the witness has been on the editorial committee of the internationally recognized Color Index which is used by every major government and the coloring trade in the United States as a means of identifying commercially available dyes, pigments, and natural colorants. The people who use natural and synthetic dyestuffs and colors consider the term "coloring" to mean the external application of color.

According to the witness, the Color Index, while listing two natural yellow colors, does not include xanthophyll nor has it ever been petitioned to have it listed as a commercial colorant. No product which must be ingested to produce a color is listed in the Color Index. Xantho-

phyll, according to the witness, is not used to dye fabrics, wood, or paper.

Mr. Swartswalder was aware of the Roche color fan and believed it was a standard used in measuring the color of the yolk of an egg.

The record satisfactorily establishes the imported marigold meal is used as an ingredient of poultry feed for the sole purpose of imparting a yellow color to the skin of the chicken and the yokes of the eggs. Basically, marigold meal has no nutritional value and is mixed with the feed on a basis of one-half to 3 pounds to 1 ton of poultry feed.

In the absence of headnote 1(a) of schedule 1, part 15, subpart C of the Tariff Schedules of the United States, the marigold meal would fall within the provision as classified. However, said headnote excludes products provided for in schedule 4 (except part 2E) or schedule 5 (except part 1K). Plaintiff's claim is under schedule 4, part 9; hence, if the claimed provision is applicable to the merchandise at bar, it would not be dutiable under the provision utilized for classification. The intent of Congress in enacting the modification of headnote 1(a) of schedule 1, part 15, subpart C, is referred to in Senate Report No. 530 (at pp. 11–12), and the Conference Report No. 979 (at p. 12). This exclusionary language was not initially in the Tariff Schedules of the United States, but was added by Public Law 89–241 (1965). The reports point out the amendment is designed to insure that articles described in the chemical and nonmetallic mineral schedules are not to be dutiable as animal feed. The sole judicial interpretation of said headnote 1(a) insofar as research reveals is the case of *Enrique Garza* v. *United States*, 66 Cust. Ct. 212, C.D. 4192 (1971), which held that plaintiff's burden is limited to establishing that the imported merchandise comes within the scope of the provision claimed.

In order to come within the scope of item 470.80, *supra*, plaintiff must establish the marigold meal to be:

1. a product of vegetable origin;
2. chiefly used for coloring or tanning; or
3. crude or processed within headnote 2(a) of schedule 4, part 9, subpart A.

The court can readily dispose of the first portion of proof inasmuch as it appears not to be disputed that the marigold meal is of vegetable origin. The record establishes and defendant's answer admits the marigold meal to be of vegetable origin.

There is the further question of whether the pigmentation of the skin of the chicken and the yolks of the eggs falls within the language, "suitable for coloring (including dyeing and staining)."

Plaintiff contends the marigold meal falls within the language since the chief and only use is for the purpose of coloring the tissue or skin of chickens and the yolks of their eggs. Additionally, plaintiff contends

the end result of the addition of marigold meal to the poultry feed falls within the dictionary definition of coloring. The statutory language, plaintiff contends, does not limit the meaning of coloring to external application. It is further contended that the Food and Drug Administration classifies marigold meal as a color additive.

Defendant on the other hand takes the position that marigold meal is not chiefly used for coloring within the meaning of either item 470.80 or item 470.85 of the Tariff Schedules of the United States since coloring must be applied externally and not by ingestion. This, defendant contends, is supported by the legislative history and the dictionary definition. It is urged by defendant that all of the articles provided for in schedule 4, part 9, subpart A are dye and tanning products. Since marigold meal is a substitute for other feed products which supply xanthophyll, defendant contends it was not the intent of Congress to include the imported merchandise in either item 470.80 or item 470.85. The testimony of defendant's witness that marigold meal is not listed in the color index, which is an internationally recognized reference in the coloring industry, is additional reason for excluding the imported merchandise from the claimed classification.

There appears to be no question that marigold meal falls within the literal meaning of the provision for "Products of vegetable origin used chiefly for coloring or tanning." The common meaning of a tariff term applies in the absence of a contrary intent or a commercial meaning which differs from the common meaning. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973). The common meaning of a tariff term is a question of law to be decided by the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). The courts may consult dictionaries and other reliable sources to aid their judicial knowledge.

"Webster's Third International Dictionary" (1963) defines coloring as follows:

> Coloring 1a: The act of applying colorants: the application of color; or
> Coloring b: Something that produces color or color effects.

This definition in and of itself would appear to encompass the marigold meal involved herein. However, in addition to the definition, the court notes that headnote 1 of subpart A provides as follows:

> 1. This subpart covers only materials, extracts, decoctions, and other preparations suitable for coloring (including dyeing and staining) or for tanning. All the products provided for are of vegetable origin except cochineal (item 470.05) which is of animal origin.

The words in parentheses, "including dyeing and staining," are not words of limitation, but words of extension. *Heemsoth & Basse et al.* v. *United States*, 24 CCPA 208, T.D. 48657 (1936); *Semon Bache & Company* v. *United States*, 47 Cust. Ct. 31, C.D. 2275 (1961).

Congress therefore intended to include in the term "coloring" more than dyeing and staining. Accordingly, items 470.80 and 470.85 include products that are used for coloring which may not be dyes or stains. This is further evidenced by the headnote of schedule 1, part 15, subpart C, which exempts schedule 4 (except part 2E) and schedule 5 (except part 1K). Part 2E covers chemical mixtures and part 1K covers nonmetallic minerals and products, not specially provided for. If Congress had intended to exclude part 9, subpart A of schedule 4, it could have been readily accomplished by so providing in the headnote to schedule 1.

Where the statutory language is clear and unambiguous, resort to legislative history is unnecessary. In any event, it must be borne in mind the evidence establishes the imported marigold meal was not utilized according to Mr. Spaul prior to 1968, or the mid-1960's according to Mr. Twining. Hence the material presented to Congress in the Tariff Classification Study and the supplemental reports in the years 1960–63 would not be determinative. However, since tariff acts are written for the future as well as the present, it is well recognized that tariff terms will embrace merchandise not known to commerce at the time of the enactment. *Sears, Roebuck and Co.* v. *United States*, 46 CCPA 79, C.A.D. 701 (1959).

An excerpt of the FDA regulation in 21 CFR 70.3(f), while not determinative is certainly enlightening. Said provision defining "color additive" reads in part as follows:

> * * * An ingredient of an animal feed whose intended function is to impart, through the biological processes of the animal, a color to the meat, milk, or eggs of the animal is a color additive and is not exempt from the requirements of the statute. This definition shall apply whether or not such ingredient has nutritive or other functions in addition to the property of imparting color. * * *

The court is aware that what is termed a color additive by one agency under a different statutory scheme is not controlling under customs law. It is in any event inconsistent with defendant's position that color must be externally applied and may not be ingested to obtain the results of coloring.

Plaintiff has established the marigold meal to fall within the provision for products of vegetable origin used chiefly for coloring.

The final issue for determination is whether the marigold meal falls within headnote 2(a) as "crude or processed" (item 470.80), or within the "other" provision (item 470.85).

Dr. Javier Loustaunau, director of research and development of the shipper, testified as to the processing of the marigold meal as follows:

> Q. And would you tell us the process used by Produmex from the time the marigold flowers are harvested to the time the product is exported to the United States on a step by step basis?

A. The marigolds are picked by hand. I don't know if all of you are familiar with the marigold flower, cut from the bottom of the calyx by hand and transported to a plant in trucks and then it is loaded into some feeders, continuous feeders, if you are familiar with the highrise, one of these feeders, it pushes the flower and, at the end of the feeder, we have a cutter. It is what we name it. We improvise it from the cylindrical cutters of the combine machines.

Q. What happens when it gets to the cutter?

A. Imagine it's a cylinder with another cylinder inside. The inside has blades and the flower goes into there, and the calyx, the solid part, goes in between the blades and the cylinder and that separates the petals from the calyx and the seeds.

Q. After it's cut, what happens to the marigold flowers?

A. After this, it goes into the rest of the processing. We have changed this processing through the years. At the present time, we are gathering the flowers——

Q. With the marigold meal at issue here, were the flowers that produced it—were they blanched, as well?

A. No, sir. This has been added since this year.

Since headnote 2(a) defines crude or processed, it is not necessary for the court to review the numerous cases cited by the parties as to what constitutes crude. The processes described above, the cutting and grinding, as well as the drying to reduce bulk and moisture, are well within the headnote.

The addition of ethoxyquin to prevent the oxidation of its xanthophyll does not, in the opinion of the court, constitute processing. The addition of said product is to prevent the loss of the xanthophyll content which is the basis of sale. Accordingly, none of the processes or the addition of the ethoxyquin would remove the marigold meal from the provision of item 470.80 as claimed.

Judgment will be entered accordingly.

(C.D. 4810)

TEXAS INSTRUMENTS INC., PLAINTIFF, v. UNITED STATES, DEFENDANT

Court No. 77–4–00580

Monolithic integrated circuits

A monolithic integrated circuit is a single chip of silicon in which electronic components consisting of diodes, transistors, and resistors have been formed and interconnected. The bonding of the integrated circuit chip to a substrate, the extension of leads and the encapsulation thereof with cavities provided on the molded form for the subsequent accommodation of a quartz crystal, a capacitor and batteries do not serve to cause the imported merchandise to be "more than" a packaged integrated circuit.

A "timepiece movement" is an article which utilizes the transmission or transfer of physical or mechanical motion among its component parts in order to perform its timekeeping function.

The solid-state digital watch module of which the merchandise in question is a component does not incorporate the transfer of any physical or mechanical motion therein and, accordingly, is not a "timepiece movement" within the intendment of the Tariff Schedules of the United States.

The merchandise in question by virtue of its intrinsic characteristics, nature, and function is more specifically described under item 687.60, TSUS, as an integrated circuit.

The Tariff Schedules of the United States does not require that a watch contain a movement, but if a watch does contain a movement it may be either a "watch movement" or a "clock movement" depending upon its size.

The sole distinction found in the Tariff Schedules of the United States between "watch movements" and "clock movements" is based upon the size of the movement.

[Judgment for plaintiff.]

(Decided June 29, 1979)

Frederick L. Ikenson for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch; *Sheila N. Ziff*, trial attorney), for the defendant.

BOE, Judge: The merchandise concerning which the within cause of action relates was imported by the plaintiff from El Salvador and entered at the Port of Dallas/Fort Worth on August 2, 1976, for incorporation and use in solid-state electronic digital watches. Upon liquidation said merchandise was classified by the District Director of Customs at Houston, Tex., under item 720.75, TSUS, modified by T.D. 68–9, as assemblies or subassemblies for watch movements consisting of two or more parts joined together, providing:

Schedule 7, Part 2, Subpart E

	Assemblies and subassemblies for watch movements consisting of two or more parts or pieces fastened or joined together:	
	* * * * * * *	
720.75	Other assemblies and subassemblies	4.5¢ for each jewel (if any) + the column 1 rate speci-

		fied in item 720.65 for bottom or pillar plates or their equivalent therein (if any) + 1 cent for each other part or piece therein (if any), but the total duty on the assembly or subassembly shall not exceed the column 1 duty for the complete movement for which suitable, nor be less than 22.5 percent ad val. unless said 22.5 percent rate exceeds the column 1 duty for the complete movements.

The plaintiff contends that the merchandise in issue is properly classifiable under item 687.60, TSUS, modified by T.D. 68–9, as transistors and other related electronic crystal components, providing:

Schedule 6, Part 5

	Electronic tubes (except X-ray tubes); photocells; transistors and other related electronic crystal components; mounted piezoelectric crystals; all the foregoing and parts thereof:	
	Television picture tubes:	
	* * * * * * *	
687.60	Other	6% ad val.

In its answer to the plaintiff's complaint, the defendant raised two alternative affirmative defenses. In so doing, the defendant alleges that in the event the subject merchandise is found to be not properly classified under item 720.75, TSUS, then, and in that event, the subject merchandise should be classified under item 720.82, TSUS.

The foregoing alternative claim, however, has been abandoned by the defendant. A second alternative claim of the defendant asserts that the merchandise is properly classifiable under item 720.86, TSUS, providing:

Schedule 7, Part 2

	Assemblies and subassemblies for clock movements, consisting of two or more parts or pieces fastened or joined together:	
	* * * * * * *	

	Other assemblies and subassemblies:	
	* * * * * * *	
720.86	For other movements	16% ad val. + 6.25¢ for each jewel (if any) + 0.75¢ for each other piece or part.

At the time of the trial of the within action, respective counsel, with the approval of the court, entered into the following stipulations:

1. The official entry papers may be received in evidence, as an unmarked exhibit, with the understanding that defendant does not agree to the characterization of the imported merchandise appearing on said papers.
2. The imported merchandise is designated on the relevant invoice as X971, with, or without other descriptive information.
3. Plaintiff's exhibit 1 for identification is a representative sample of the imported merchandise, and may be received in evidence.
4. Plaintiff's exhibits 13 and 14 for identification, each of which is a functioning watch module in a clear plastic case containing, among other things, a version of exhibit 1, and a Texas Instruments DIS611 may be received in evidence.
5. The imported merchandise was manufactured in about July 1976.
6. Solid-state digital electronic watches were first introduced in commerce in about 1972.
7. The only part of the watch into which the imported merchandise is incorporated, which defendant considers to be a moving part, is the quartz crystal component. [R. 7–8.]

From the testimony introduced by both the plaintiff and the defendant in the within proceeding, it appears to be undisputed that the merchandise in question consists of a monolithic integrated circuit chip, commonly referred to as an IC chip, which has been affixed to a framed or substrate permitting its encapsulation for subsequent use as a component of the module in a solid-state digital watch. Before proceeding to the basic issue before this court as to the proper classification of the subject merchandise, an elementary understanding with respect to the manner in which the subject article is manufactured and/or processed, its function as well as its relationship to other components ultimately comprising the module used in a solid-state digital watch, would appear to be not only salutary, but a necessary preface.

A definition of a monolithic integrated circuit chip in its simplest form may be found in the testimony of Mr. Jack Kilby, who invented this article or device in 1958 and received a patent thereon in 1964:

> A monolithic integrated circuit chip is a silicon wafer in or on which electronic components, such as transistors, diodes, resistors,

> and capacitors have been formed and interconnected to perform a desired function. [R. 535.]

With respect to the meaning of the term monolithic, the witness testified:

> * * * "monolithic" refers to those circuits which are formed entirely in or on a single chip or wafer of semiconductor material. [R. 541.]

Silicon may be classified as one of the most commonly used semiconductor materials and is best characterized in the semiconductor industry as possessing the ability to conduct electricity under certain conditions. Accordingly, the process designed to create the integrated circuit chip is initiated by slicing a thin piece or wafer from a large cylindrical-shaped bar of crystal silicon. After polishing, the silicon slice is subjected to a complex series of high temperature and photolithographic processes thereby causing a multitude of identical miniscule squares to be defined thereon, each of said squares being commonly referred to as a chip.[1] Through the application of photosensitive materials, the establishment of a geometric pattern, the introduction of chemicals and the further application of high temperatures, certain elements consisting of transistors, diodes, and resistors are built within each defined chip comprising the silicon slice. In an evaporation process aluminum metal is allowed to cover the entire silicon slice. Again, after a further photolithographic process by which an interconnecting pattern is established followed by an etching away of a portion of the aluminum surface, there is thereby developed a metal pattern that interconnects the transistors, diodes, and resistors built within each of the individual chips.

The process by which the integrated circuit chip is created as hereinbefore described is effected at the plant of the plaintiff at Sherman, Tex. Upon completion, the integrated circuit chips together with specifications and quality control documents are transmitted to the facility of the plaintiff in El Salvador for further processing. In the latter country, the individual integrated circuit chip is attached to a lead frame or substrate in order to provide a mechanical adherence. Around the periphery of each chip, small metal pads are located from which fine gold wires measuring 0.001 of an inch in diameter are attached to the lead frame substrate by means of heat and compression, thereby providing a connection from the chip to the external portion of the frame. The integrated circuit chip as affixed to the lead frame is encapsulated in a plastic mold providing protection from the environment, and further providing certain recesses or cavities therein for the subsequent accommodation of a quartz crystal, a capacitor, batteries and a light emitting diode display. It is in this

[1] As illustrated by plaintiff's exhibit 8 admitted in evidence, each of the square chips measures approximately one-eighth of an inch from one side to the other.

form that the merchandise in question is returned and entered into the United States.

As the merchandise in question, the quartz crystal, the capacitor, and the display element are subsequently assembled by the plaintiff in its facilities within the United States, the unit becomes collectively known as a module ready for the fitting within a watchcase and acceptance of batteries.

In its determination of the issues involved herein, the court deems it sufficient to recognize without further amplification the presumption of correctness that attaches to the determination made by the District Director of Customs, as well as the burden incumbent upon the plaintiff to overcome this presumption and to prove otherwise. 28 U.S.C. 2635(a). The court is of the opinion that the plaintiff has met this burden and has established that the subject merchandise as imported should be classified as transistors and other related electronic crystal components under item 687.60, TSUS.

Implicit in the District Director's determination that the merchandise in question is classified under item 720.75, TSUS, is the premise that the module in a solid-state digital watch of which the subject merchandise is an assembled component part is a "watch movement" within the purview of the tariff schedules. Headnote 2(b) of schedule 7, part 2, subpart E, is of only limited assistance in its definition of this term:

> [T]he term "watch movement" means a timepiece movement measuring less than 1.77 inches in width and less than 0.50 inch in thickness.

Except for the measurement as to size and its association with a "timepiece," no further enlightenment is provided as to what constitutes a movement. In the absence, therefore, of a special or restricted meaning given or intended to be given by the Congress, it is the obligation of the court to determine its common meaning. Although the determination of the common meaning of tariff terminology is a question of law as distinguished from a question of fact, the court, in the formulation of its judgment and the exercise of its determination, may rely on authoritative sources, the testimony of competent and expert witnesses as well as the construction and common interpretation of the term in question in the particular industry in which it has a special reference. *Davies Turner & Co.* v. *United States*, 45 CCPA 39, C.A.D. 669 (1957); *United States* v. *O. Brager-Larsen*, 36 CCPA 1, C.A.D. 388 (1948).

The term "movement" as it relates to instruments designed to deisignate time is defined in "Webster's Third New International Dctionary" (1966):

> [T]he moving parts of a mechanism that transmit a definite motion or transform motion; esp: a delicate train of wheelwork (as in a watch).

The term is, again, defined in "Webster's New Collegiate Dictionary" (1973):

> [T]he moving parts of a mechanism that transmit a definite motion.

Similarly, Funk & Wagnalls New Comprehensive International Dictionary of the English Language" (1978) contains the following definition of the term (p. 832):

> 4. Mech. A particular arrangement of related parts accompanying a motion: the *movement* of a watch. [Italic in original.]

The cogent testimony of plaintiff's witness, Henry Fried, viewed in conjunction with his long and intimate knowledge and experience in the horological industry, necessarily must be given weight and consideration. As a recognized expert in the industry, many definitions of terms used in the horological industry, including the word "movement," have been proposed and/or submitted to and approved by him before inclusion in Webster's dictionary, jewelers manuals and various other trade and technical publications. In response to questions by respective counsel as well as by the court, Mr. Fried unequivocally stated that the term "movement" is not used to designate the collective component parts of a watch. His testimony remains undisputed throughout the within proceeding that the term "movement" is defined as a "linkage of mechanical objects to transfer motion from one source to another." (R. 334.) In the same manner as the term "movement" has a specific meaning in reference to a particular subject matter such as a "movement" in a political or social activity, a "movement" in a military maneuver or a "movement" in the musical or literary arts, so in the horological industry, the term possesses a distinct and unambiguous connotation. In the absence of any evidence offered by the defendant by way of contradiction, the plaintiff, therefore, has established by undisputed substantial evidence that the term "movement" as used in the horological industry refers to a mechanism, whether mechanical or electro-mechanical, which possesses some moving parts to which or from which motion is transferred.

The defendant, however, contends that a movement does occur within the module of which the merchandise in question is a component part. It is acknowledged that a quartz crystal, which is placed in one of the cavities formed in the plastic mold which encapsulates the integrated circuit chip, serves as an equivalent electronic component. In this capacity, the molecular structure of the quartz crystal is subjected to excitation causing a vibration within its structure at what is termed an angstrom level of displacement.[2] In describing the

[2] An angstrom is defined as one ten-billionth of a meter.

nature and extent of the molecular movement of the quartz crystal. the plaintiff's witness, Chaffin, states:

> It is such that if you looked under a microscope and compared its movement to human hair movement, or something of that nature, you might see the same amount of distortion with the hair laying there. There is movement, but it requires very, very high powered techniques which are required to discern it. Not even with a simple microscope could you see the movement. (R. 141–142.)

This court is unable to view the molecular vibration occurring within the structure of the quartz crystal as a motion within the contemplation of the definition of the term "movement." Unlike the conventional watch containing a balance assembly or the electro-mechanical watch containing a tuning fork in both of which a definite mechanical motion is transferred to other component parts within the movement,[3] the molecular vibrations or displacement of the quartz crystal does not transfer either mechanical or energy motion to any other component part included within the solid-state watch module. (R. 291–293.) The quartz crystal, possessing piezoelectric qualities, serves only to interact with an electronic circuit more particularly described as an oscillator built in or on the integrated circuit chip. With the quartz crystal serving as a feedback stabilizing element, the oscillating circuit or wave form is provided with a precise frequency of 32,768 cycles per second. This frequency signal is passed through the electronic networks of the integrated circuit chip dividing the frequency by one-half on each passage, resulting in the ultimate reduction of the frequency to one cycle per second. It is the latter 1-second cycle count which is collected, stored in the integrated circuit chip and ultimately translated into a numerical display in the light emitting diode of a solid-state digital watch.[4] The molecular vibration within the quartz crystal structure providing the feedback of an oscillator circuit at a precise and regulated frequency does not fall within the definition of a "movement," the common as well as commercial meaning of which has been established in this proceeding, in light of the absence of a mechanical transfer of motion to any other component part of the solid-state module.

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[3] In the Bulova Accutron watch, the most commonly recognized electro-mechanical timepiece "* * * the vibrations of the tuning-fork are converted into a mechanical drive through a small jewelled-tipped index spring attached to one of the tines of the fork. This moves an index wheel forward one tooth each vibration * * *." K. Blakemore, "The Retail Jeweller's Guide" 191 (1970).

[4] "The integrated circuit does all the functions that are performed in the normal watch by the miscellaneous gears from the balance wheel to the hands, including the various setting mechanisms. It is the integrated circuit that makes the quartz oscillate and divides the quartz frequency to one pulse per second. In the analog quartz watch this is all the integrated circuit does. In the digital quartz, however, the IC further counts seconds, minutes, hours; contains all of the setting functions and provides the voltages and currents required to drive the LCD (liquid crystal display) or the LED (light emitting diode) display. Only since 1975 has it been possible to perform all of these functions in one integrated circuit." T. Hyltin, "The Digital Electronic Watch" 30 (1978).

The defendant, however, contends (1) that the Congress intended the term "watch movement" as used in the tariff schedules to include any device capable of measuring time, and (2) that to incorporate a requirement for the transfer of mechanical motion in the definition of the term "movement" would do violence to the legislative intent to encourage technological advances in the watchmaking industry.

In support thereof, the defendant in its brief submits extracts from the testimony of various witnesses representing foreign watch manufacturers, importers as well as representatives of the domestic watch manufacturing industry at hearings before the U.S. Tariff Commission (now the International Trade Commission) in its consideration of proposed provisions of the Tariff Schedules of the United States prior to ultimate enactment by the Congress. Of importance in this proceeding is the consideration of the nature of the controversy under discussion at said hearings, the ultimate resolution thereof and the resulting effect, if any, which might relate to a determination of the present issues at bar.

The relevant provisions relating to "watch movements" in the Tariff Act of 1930 are found in paragraph 367(a) thereof, providing in pertinent part:

> Watch movements, and time-keeping, time-measuring, or time-indicating mechanisms, devices, and instruments, whether or not designed to be worn or carried on or about the person, all the foregoing, if less than one and seventy-seven one-hundredths inches wide, whether or not in cases, containers, or housings: * * *.

The extensive hearings before the Tariff Commission in its preliminary consideration of the proposed provisions to be included in the Tariff Schedules of the United States centered upon its contemplated intention to establish one schedule for watch movements regulated by a balance wheel and a hairspring and an additional independent schedule for watch movements not regulated in the foregoing conventional manner. By its proposed additional schedule, the Commission sought to provide independently for nonconventional watch movements which had then made their first appearance in the horological industry.[5] In reviewing the respective comments made at the hearings, it is noted that the domestic watch manufacturing industry and the American Watchworkers Association strongly supported the proposal of the Commission providing for a separate, independent schedule for nonconventional watch movements with an accompanying higher rate of duty. Representatives of the foreign watchmakers as well as the American importers strongly opposed the establishment of such a separate schedule. In the course of the comments and testimony made in opposition to the Commission's proposal, reference was made to the advancements made in the horological

[5] Specific reference at the hearings was made to electric watches—the component parts of which were powered by a battery.

industry as well as to the possibility of utilizing in the future other and different operating and regulating devices. After an abortive attempt to establish a separate and independent schedule for non-conventional watch movements at a "compromise" rate of duty, the Commission, again, revised its proposed provision for the Tariff Schedules of the United States thereby assessing "timepiece movements" less than 1.77 inches in width at the rates prevailing in paragraph 367(a) of the Tariff Act of 1930. In the subsequent enactment of the present tariff schedules, watch movements, accordingly, were not confined to a specific structure but all movements within the requirements as to size were brought within the definition therein of a "watch movement."

The Tariff Act of 1930 did not define the meaning of the term "watch movement." The reason therefor was that the term had a specific commercial and common designation based upon its structure and component elements.[6] See *United States* v. *Continental Lemania, Inc.*, 21 CCPA 192, T.D. 46726 (1933); 72 Cong. Rec. 10029–32 (1930). The enactment of the Tariff Schedules of the United States marks the first attempt in the history of customs legislation to define the term "watch movement." In so doing, the Congress defines the same as a "timepiece movement" which meets the dimensional limitations of 1.77 inches in width and 0.50 inch in thickness. However, the Congress in its definitive description of a "watch movement" as a "timepiece movement" has not attempted to define the meaning of the term "movement." Nor has any judicial decision defining the meaning thereof been called to the attention of this court or been found independently.

In the present proceeding, however, it has been established by competent evidence that the common as well as the horological meaning of the term "movement" is a mechanism in which there is a physical transfer of motion. No evidence has been submitted by the defendant to controvert or qualify the established definition. Rather, the defendant invoking a questionable interpretation of the comments and testimony made at the Tariff Commission hearings, aforereferred to, seeks to attribute to the Congress the intent to place upon the term "movement" a meaning for tariff purposes different from the undisputed common as well as the horological meaning thereof.

The court is unable to accept the all-encompassing conclusion urged by the defendant that the legislative history evidences the congressional intent to include any device, and the imported merchandise in question in particular, capable of or used in measuring time

[6] An explanation of the principal components comprising a conventional watch movement is found in L. Copeland & R. Liddicoat, Jr., "The Jewelers' Manual" 181 (1967):

> A watch movement can be divided roughly into five sections: (1) the *mainspring*, which is the power plant; (2) the *train wheels*, which deliver power to the escapement; (3) the *escapement*, which permits the slow, uniform dissipation of that power, permitting it to move the hands; (4) the *balance assembly*, which is the governor of the watch, since it governs, or controls, the timekeeping; (5) the *mechanism under the dial*, which carries the hands. [Italic in original.]

as a watch movement or an assembly or a subassembly thereof. It is, indeed, fallacious reasoning to speculate that the Congress intended for tariff purposes to place a meaning on the term "movement" other than its accepted common as well as commercial meaning, and include devices of every character, when, in fact, the only "movements" which were then in existence and which were the sole subject of congressional consideration fell within the undisputed common as well as commercial meaning. In short, all of the "movements" concerning which the dispute had been centered at the time of the hearings prior to the enactment of the Tariff Schedules of the United States, possessed the same identical feature—a mechanical transfer of motion. Although general references were made throughout the hearings as to the *possibility* of new discoveries in the operation and regulation of watch movements, none of these devices was under consideration by the Commission nor, in fact, in existence. The patent on the monolithic integrated circuit was not received by the witness Kilby until the year 1964—subsequent to the enactment of the Tariff Classification Act of 1962. The stipulation entered into between the respective counsel establishes that the solid-state digital electronic watch in which the monolithic integrated circuit is a component part was first introduced in commerce in about the year 1972. To attribute to the Congress the intent to include the solid-state module and the subject merchandise, which is a component part thereof, within the provisions of a watch movement as provided by the present Tariff Schedules of the United States would endow this legislative body with a prophetic perception far transcending the very embryo of thought developing in the inventor's mind.

The court recognizes that tariff schedules, written for future as well as for present application, will embrace merchandise unknown at the time of their enactment. However, as explained in *Smillie & Co.* v. *United States*, 12 Ct. Cust. Appls. 365, 367, T.D. 40520 (1924):

> This rule, of course, does not operate to exclude articles which are not known at the time of the passage of the act, but which come into being later. As to all such articles the statute will be held to apply if the articles possess an essential resemblance to the ones named in the statute *in those particulars which the statute established as the criteria of the classification.* * * * [Italic added.]

The defendant urges that the merchandise in issue possesses the "essential resemblance" to watch movements particularly in that the subject merchandise is within the "specific parameter of width and thickness." Although the subject merchandise does fall within the dimensions prescribed for a "timepiece movement," the court, again, must repeat that the evidence herein fails to disclose wherein the imported merchandise bears any resemblance to an article described in the schedules as a "timepiece movement" as the evidence herein

establishes the term to mean in its common as well as its commercial connotation.

In its effort to sustain the classification of the subject merchandise, the defendant has failed to consider the character and identity of this article at the time of importation. In this connection our appellate court has stated in the case of *United States* v. *Colibri Lighters*, 47 CCPA 106, 109, C.A.D. 739 (1960):

> As the Government properly points out, however, classification should not be determined on the basis of the use to which the individual articles included in the instant shipment are to be put, but on the basis of chief use of articles of that class generally. *H. J. Baker & Bro.* v. *United States*, 37 CCPA 52, C.A.D. 419, and cases there cited. In determining such use it is proper to consider not only the testimony offered, but the characteristics of the merchandise itself.

As previously indicated herein, the evidence is uncontradicted that all integrated circuits are constructed and processed in substantially the same manner, notwithstanding the purpose and use for which they ultimately may be designed. Through the construction of appropriate patterns within the chip, the respective semiconductor elements are interconnected to attain the desired objective. Similarly processed integrated circuits, but possessing different diodes, resistors and transistors as well as differing interconnecting patterns, are constructed to perform a variety of other electronic functions whose capabilities may be designed for use in comptometers, calculators, television remote control receivers, bubble memory devices and photosensitive camera devices. In each of the afore-described integrated circuits, the form thereof or its encapsulating package necessarily is designed so as to be accommodated and utilized in the equipment for which it is intended.

When questioned as to whether the imported merchandise in the form of its encapsulation could be viewed as an integrated circuit, the plaintiff's witness, Kilby, testified:

> I would consider this to be consistent with the most basic philosophy and thrust of integrated circuits in that—in the sense that it contains provisions for not only forming, but electrical interconnecting, attaching leads, and providing a degree of mechanical integration of the required components for a particular function. [R. 538.]

In expressing his opinion as to the "packaging" of the subject merchandise and, in particular, the cavity recesses thereon, the witness further stated:

> I think every electronic component is usually designed with an understanding of the environment, mechanical and physical environment in which it is to operate. This is simply one which has been optimized for a particular purpose; that of going in an electronic watch and, therefore, I tend to feel that the presence of

these cavities, for instance, does not significantly change the intent or purpose of the design. [R. 539–540.]

Considering the admonition of our appellate court in *Colibri Lighters, supra*, the substantial unanimity of all of the evidence and testimony presented and, above all, the intrinsic characteristics, nature and function of the subject merchandise itself, this court can only conclude that the merchandise in question is more specifically provided for under item 687.60, TSUS. The acceptance of defendant's contention that the subject merchandise should be classified as a part of an assembly or subassembly of a watch movement, indeed, would fail to recognize that the principal element of the encapsulated merchandise in question consists of a singular electronic device, a monolithic integrated circuit, which to a great extent has revolutionized a multitude of industries in which its function is utilized. It might be well said with respect to the proceeding before this court that the electronic industry has not become a part of the horological industry, but, rather, a part of the horological industry has become a part of the electronic industry.

As a further defense to plaintiff's claimed classification, the defendant urges that the merchandise in question is more than an integrated circuit. A review of the evidence in the within proceeding, however, does not provide substantiation for the application of this doctrine. As stated in the case of *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, 34, 450 F. 2d 1396 (1971):

> Only the most general of rules can be ascertained from the previous decisions dealing with the "more than" doctrine, and it appears that each case must in the final analysis be determined on its own facts. * * *

The evidence herein establishes that the merchandise in question is a packaged integrated circuit bonded to a substrate to which leads have been attached. Although integrated circuits are substantially constructed similarly, the formal packaging or encapsulation thereof will vary in order to protect from the environment because of factors such as cold, heat, humidity, or light, as well as to permit its utilization in a designed space. Professor Strauss, the sole witness on behalf of the defendant, advised the court that the merchandise in question was "a portion of a watch module containing an integrated circuit." (R. 519.) Because, however, the plastic mold encapsulating the integrated circuit chip bonded to the substrate possessed cavities or recesses to permit the subsequent housing of batteries, a quartz crystal, a capacitor and a digital display, the witness qualified his identification by concluding that the merchandise in question was *more than* an integrated circuit.

It would appear that the respective constructions placed upon the "more than" doctrine by the witness Strauss and by our appellate court, indeed, are at variance. It is acknowledged that the fixation

of a lead to the substrate as well as the formation of certain cavities in the plastic mold in order to provide subsequent accommodations for other components are additional features of the article in question. However, it would appear self-evident that these features are not coequal with the primary function and purpose of the encapsulated merchandise in question, but, indeed, subordinate and auxiliary thereto. The cavities have been formed in the plastic mold encapsulating the integrated circuit chip solely to accommodate and provide a resting place for other components of the watch module when provided. To give such cavity recesses or a lead extension, a function of such significance as to be coequal with the function of the encapsulated integrated circuit chip most certainly would ignore the acknowledged primary timekeeping role of the latter device. As clearly established by a preponderance of all the evidence, the accommodations for the future assembly of other components as well as the lead extension for a future connection with other components merely serve as a conduit permitting the singularly ingenuous capabilities of the encapsulated integrated circuit chip to be connected to the outside environment and subsequently utilized. *Amico, Inc.* v. *United States*, 66 CCPA—, C.A.D. 1214, 586 F. 2d 217 (1978); *United States* v. *Oxford International Corp.*, 62 CCPA 102, 517 F. 2d 1374 (1975); *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, 471 F. 2d 1397 (1973); *Nootka Packing Co.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935); *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, C.D. 2703 (1966).

Finally, the defendant contends in the alternative that if the merchandise is found not to have been properly classified under item 720.75, TSUS, it is properly classifiable under item 720.86, TSUS, as other assemblies and subassemblies for clock movements.[7] Presumably, the reasoning of the defendant is that watches, under subpart E, headnote 2(a),[8] must contain movements, and that if the movement is not a "watch movement" under headnote 2(b), then it must be a "clock movement" under 2(c).

The short answer to this contention is that headnote 2(a) does not create the requirement that a watch contain a movement. Rather, its purpose is to specifically define a watch as a timepiece, which is suitable for wearing or carrying on or about the person. In the instant case, however, the issue is not whether the imported article is ultimately used in a watch, but whether it constitutes a movement within

[7] Headnote 2(c) provides:

(c) the term "clock movement" means any movement or mechanism, other than "watch movements" as defined in headnote 2(b), above, intended or suitable for measuring time.

[8] Headnote 2(a) provides in pertinent part:

For the purposes of this subpart—

(a) the term "watches" embraces timepieces * * * suitable for wearing or carrying on or about the person, whether or not the movement therein is within the definition of "watch movement" in headnote 2(b) * * *.

the intendment of the Tariff Schedules of the United States. Headnote 2(a) does not serve to answer this question. The concluding clause of headnote 2(a): "* * * whether or not the movement therein is within the definition of 'watch movement' in headnote 2(b) * * *," merely serves to provide that if a watch does contain a movement, as that term is commonly understood, it may either be a watch or a clock movement, depending upon whether it satisfies the dimensional limitations for "watch movements" in headnote 2(b). The sole factor distinguishing a watch movement from a clock movement for tariff purposes is the size thereof.

It having been established to the satisfaction of this court that the module in the solid-state digital watch does not incorporate the transfer of physical motion to or from any of its components, and that the merchandise in issue is more specifically provided for under item 687.60, TSUS, the defendant's alternative claim must fail.

The defendant in the conclusion of its brief urges that the affirmance of plaintiff's claimed classification would make a "shambles" of the tariff schedules. The court is unable to share such a dire prophecy.

New and sometimes unimaginable horizons have only recently opened and will continue to open in the electronic and semiconductor industries. Sophisticated devices are being created to perform functions hitherto performed by a means which might be equated with the horse and buggy in its relationship to the automobile of today. The greatest injury that could be caused to our present tariff schedules would be to attempt to fit each such newly created device in a pigeonhole classification dictated by the instrument in which it might be utilized, irrespective of its individual identity. Indeed, untold confusion could thereupon be wrought.

The integrity of the tariff schedules will be far greater preserved if artificial classifications are not rationalized under antiquated schedules neither designed nor intended for present day application. Should consistency with historical purpose or desired uniformity in interpretation be deemed to dictate otherwise, such a determination necessarily lies solely within the discretion of the Congress, not within the province of this court.

The court, accordingly, finds that the plaintiff has sustained its dual burden of proof in establishing that the liquidated classification of the merchandise in issue by the District Director of Customs under item 720.75, TSUS, was in error and incorrect and that the claimed classification with respect to the subject merchandise under item 687.60, TSUS, is correct and proper.

Let judgment be entered accordingly.

(C.D. 4811)

TEXAS INSTRUMENTS INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 77–4–00579

Visible light emitting diodes

1. The display element of a solid-state digital watch, also referred to as a visible light emitting diode, is not properly classified as a "dial" under item 720.40, TSUS, for the reason that the solid-state digital watch of which it is a part does not possess a "movement."

2. The common meaning of the term "dial" is recognized as a plate or face of a watch or clock upon which is contained permanent graduations or reference points from which the passage of time can be ascertained.

3. The visible light emitting diode incorporated in a solid-state digital watch is properly classified as an indicator panel or a visual signaling apparatus under item 685.70, TSUS.

[Judgment for plaintiff.]

(Decided June 29, 1979)

Frederick L. Ikenson for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch; *Sheila N. Ziff*, trial attorney), for the defendant.

BOE, Judge: The within proceeding is a companion case to the cause of action entitled *Texas Instruments Inc.* v. *United States*, Court No. 77–4–00580, C.D. 4810. Pursuant to the stipulation of respective counsel, the entire record thereof has been incorporated in the instant proceeding.

The imported merchandise in issue, described on the relevant invoices as "DIS 611" with or without other descriptive information, was imported by the plaintiff from Taiwan and entered at Dallas/Fort Worth, Tex., on June 15, 1976.

The District Director of Customs at Houston, Tex., classified the said merchandise as watch dials under item 720.40, TSUS, as modified by T.D. 68–9, providing:

	Dials and parts thereof:	
	Watch and clock dials:	
720.40	Under 1.77 inches in width	1.2¢ each +22.5% ad val.

The plaintiff claims that the subject merchandise should be classified under item 685.70, TSUS, as modified by T.D. 68–9, as electrical indicator panels or electrical visual signaling apparatus, providing:

685.70	Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signaling apparatus, all the foregoing which are electrical, and parts thereof	4% ad val.

At the time of trial of the within action, respective counsel with the approval of the court entered into the following stipulations:

(1) The entire record in the case of *Texas Instruments Incorporated* v. *the United States*, Customs Court No. 77–4–00580, may be incorporated herein.

(2) The official entry papers may be received in evidence as an unmarked exhibit.

(3) The imported merchandise is designated on the relevant invoice as DIS–611, with or without other descriptive information.

(4) The imported merchandise is made with "W–70" bars.

(5) Plaintiff's exhibit 25 for identification is a representative sample of the imported merchandise, and may be received in evidence.

(6) There is no colon on plaintiff's exhibit 25 for identification.

(7) The imported merchandise was manufactured in about May 1976.

(8) The imported merchandise comes within the description of electrical indicator panels.

(9) The imported merchandise comes within the description of electrical visual signaling apparatus. [R. 3–4.]

In the consideration of the instant proceeding, it must be acknowledged initially that a solid-state digital watch in which the subject merchandise is an incorporated part is a device by which time is transmitted and made discernible to the human eye. The issue presently before this court is restricted to a determination as to whether the imported merchandise, represented by plaintiff's exhibit 25, is a dial of a watch within the purview of item 720.40 TSUS. The court concludes from the evidence presented that the classification determined by the District Director of Customs is in error and, accordingly, cannot be affirmed.

Headnote 1 to subpart E, part 2, schedule 7, Tariff Schedules of the United States, provides:

Subpart E headnotes:

1. This subpart covers watches and clocks, time switches and other timing apparatus with clock or watch movements, and parts of these articles. This subpart, however, does not cover—* * *.

From the foregoing it is clear that in the subsequent schedules provided for thereunder and as a prerequisite to their respective classifications, only "parts" of watches possessing a "watch movement" are included. Thus, in order for the subject merchandise to be classified as a dial under the provisions of item 720.40, TSUS, the article to which it is alleged to be a part must be determined in the first instance to be a watch within the meaning of the afore-quoted headnote, i.e., a watch possessing a "movement."

The headnotes of subpart E define the terms "watch movement" and "clock movement":

2. For the purposes of this subpart—

* * * * * * *

(b) the term "watch movement" means a timepiece movement measuring less than 1.77 inches in width and less than 0.50 inch in thickness;

(c) the term "clock movement" means any movement or mechanism, other than "watch movements" as defined in headnote 2(b), above, intended or suitable for measuring time;

In the companion case of *Texas Instruments Inc.* v. *United States*, Court No. 77–4–00580, the record of which is incorporated herein, this court has determined that the solid-state digital watch (and the module contained therein of which the present merchandise in question is a part) does not incorporate the transfer of any physical or mechanical motion among its component parts and, accordingly, does not possess a "timepiece movement" within the intendment of the appropriate tariff schedules. A more detailed reiteration of the court's reasoning set forth with particularity in the companion case is deemed unwarranted. Suffice it to merely add, that the subject merchandise, irrespective of its nature, shape or function, cannot be classified as a part of a watch within the intendment of the headnote to subpart E in the absence of a preliminary determination and finding that the watch, of which it is a part, possesses a "timepiece movement." Accordingly, this court deems that its decision in the case of *Texas Instruments Inc.* v. *United States*, Court No. 77–4–00580, is determinative of and serves to sustain plaintiff's claim in the within proceeding that the classification of the subject merchandise under item 720.40, TSUS, is in error.

In directing our attention to plaintiff's claim that the imported merchandise should be classified under item 685.70, TSUS, it is proper that brief consideration be given to its essential nature and composition. The article, described as a visible light emitting diode (referred to as VLED), is manufactured by a process similar to which a monolithic integrated circuit chip is constructed.[1] On a slice of semiconductor material known as gallium arsenide or phosphide, a series of minute chips are defined and "junctions" formed therein by means of an aluminum metalization process. The chips, each approximating the size of the head of a pin, are separated into discrete entities, also referred to as a bar.

From the unrebutted testimony of professional engineering witnesses, it has been established that all visible light emitting diodes, including the merchandise in question, are constructed in an identical manner. The basic component of a diode is the monolithic chip or bar which has been processed in the manner hereinbefore described. The number

[1] A general description of the manner in which a monolithic integrated circuit chip is manufactured and/or processed is found in this court's decision in the case of *Texas Instruments Inc.* v. *United States*, Court No. 77–4–00580, C.D. 4810.

of chips or bars, which may be required for the purposes desired, are bonded upon a ceramic substrate through the use of a conductive epoxy. After the attachment of fine gold wires providing a connection between the chip and the substrate, a lens is molded over the respective chips for the purpose of providing magnification as well as protection from the environment. Through the electric currents and impulses provided by the integrated circuit chip within the watch module, the seconds, minutes and hours counted therein are translated into a visual numerical display in the light emitting diode of the solid-state watch.

The testimony adduced herein further reveals that visible light emitting diode displays are used for multiple purposes. Such displays are utilized in: CB radios, TV channel indicators, calculators, clocks, watches, microwave ovens, coffeepots, memory calendars, voltmeters, digital thermometers, and many and sundry other appliances. The number of chips or bars which may be required in a visible light emitting diode are necessarily determined by the desired requirements of the article in which it is to be used. Thus, in calculators which provide for the addition, subtraction, multiplication, and division of figures and, accordingly, require a decimal point as well as a computation of numerical figures consisting of large totals, a greater number of chip or bar segments are required.

In the examination of the record herein, it is noted that in the pretrial joint memorandum signed by respective counsel and filed with the court prior to trial under the heading "Agreement on issues," the following statement is contained:

> * * * Defendant agrees with plaintiff that should the court find the classification as watch dials to have been erroneous, then the proper classification would be under plaintiff's claimed provision, item 685.70, TSUS, for electrical indicator panels and electrical visual signaling apparatus. (P. 3.)

In the stipulations entered into by respective counsel in open court at the time of trial, it was further agreed:

> (8) The imported merchandise comes within the description of electrical indicator panels.
> (9) The imported merchandise comes within the description of electrical visual signaling apparatus. (R. 4.)

In view of the determination previously made herein that the subject merchandise is erroneously classified under item 720.40, TSUS, it is abundantly clear from the record that the defendant is, accordingly, in accord with the plaintiff in respect to its claimed classification and that the plaintiff's burden of proof in connection therewith has been sustained. However, in order to assure that full recognition is given to the arguments of the defendant presented in its brief, the court is disposed to consider the same in light of the evidence adduced in this proceeding.

In its brief the defendant appears to base its reasoning on two premises: (1) that the function and purpose of the merchandise in question is to ascertain time; (2) that the merchandise in question is capable of use only in the solid-state digital watch of the plaintiff. From these premises the defendant concludes that the subject merchandise must be classified as a "dial." The court is of the opinion that such a conclusion is a non sequitur. In the absence of an express definition of the term "dial" in the Tariff Schedules of the United States, it is incumbent upon the court to determine its common meaning as a matter of law. *Davies Turner & Co.* v. *United States*, 45 CCPA 39, C.A.D. 669 (1957); *United States* v. *O. Brager-Larsen*, 36 CCPA 1, C.A.D. 388 (1948).

From all of the testimony submitted in the within proceeding, as well as from an examination of relevant authorities, it is clearly recognized that the term "dial" has a specific common meaning as well as a distinct meaning in the horological industry. With special reference to timepieces, the term "dial" is defined by the following lexicographical authorities as follows:

> [T]he *graduated* face of a timepiece on which the time in hours and minutes and sometimes seconds is shown usu. by pointers or hands. [*Webster's Third New International Dictionary* 622 (1966) (italic added).]
>
> The face of a watch or clock *marked for hours, minutes, etc.;* also any *graduated* circular plate or face upon which anything is indicated by a pointer or needle, as in a steam-gage or mariners' compass, or lettered face-plate of a permutation-lock. [*Funk & Wagnalls New Standard Dictionary of the English Language* 699 (1952) (italic added).]
>
> Any *graduated* circular plate or face, as of a watch, clock, gage, mariners' compass, or radio receiving set. [*Funk & Wagnalls New Comprehensive International Dictionary of the English Language* 353 (1978) (italic added).]
>
> The plate fixed behind the hands of a timepiece, *marked with divisions and numerals indicating time* by the movement of the hands. [*The Jewelers' Dictionary* (3d ed. 1976) (italic added).] [2]

At the trial of this action, plaintiff's expert witness, Henry Fried, responded negatively when asked whether the subject merchandise, described as a DIS–611, constituted a watch or clock dial in the horological industry:

> *There is no dial upon which there are graduated numerals or reference points,* there is no set of hands to move upon the reference points on the dial to give an indication of the time. [R. 123 (italic added).]

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[2] Plaintiff's expert horological witness, Henry Fried, described "The Jewelers' Dictionary" as "the Bible of the industry and, incidentally, the only dictionary for the industry." (R. 121.)

Similarly, the unrebutted testimony at the trial indicated that the VLED display is neither advertised as, nor referred to in commerce as, a watch or clock dial. Rather, it is commonly known as solid-state digital "display" or "readout." [3]

The function of the subject merchandise to indicate or display time does not, ipso facto, cause such an article to be designated a "dial." Again, as stated in the companion case hereto, we are witnessing in the horological industry the utilization of a singular electronic device, unrelated to conventional timepieces or parts thereof, but possessing the capability of translating the time factor computed by the integrated circuit chip into an instantaneous, nonreoccurring visual display. Except for the total number of bar segments utilized, the function of the subject merchandise in the solid-state digital watch is identical to the device similarly constructed and used in a calculator to display the computation of numerical figures.[4]

The court, likewise, is unable to accept the argument of the defendant that the design of the subject merchandise, making it adaptable for use only in the solid-state digital watch of the plaintiff, causes it to be classified as a "dial." A limitation as to size or a limitation upon its visual computative capability does not serve to change its identity into a "dial" whose function, design and characteristics are entirely dissimilar. *See United States* v. *Colibri Lighters*, 47 CCPA 106, 109, C.A.D. 739 (1960).

The basic identifying characteristic of a watch or clock dial singular to the common and commercial meaning is the *presence on the article itself* of a series of graduations or reference numbers or points from which the passage of time can be ascertained, commonly in conjunction with a set of hands or pointers. The dial does not directly tell time. It enables the viewer to tell time by means of the relative progression of a marker (e.g., pointer or hands) over the various graduations or reference points. Time, in other words, is indicated by the present position of the marker with reference to where it has been and where it is going.

The DIS–611 VLED display incorporates none of these elements. There are no graduations or reference points from which the relative passage of time can be understood. When the appropriate button is pushed, an electrical impulse causes various segments of the bars on the display to light, thereby directly indicating by the precise numerical figures the immediate time of day. No relative progression from the past, to the present, and into the future is possible by comparison with permanent reference points.

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[3] See R. 49–53 (Van Beisen); r. 88–89 (Cardenas); r. 111–114 (Coup); r. 126–127 (Fried).

[4] Such a comparison is well demonstrated in plaintiff's exhibit 28.

From the entire record in this proceeding, the court is satisfied that the merchandise in issue is properly classified, as claimed by the plaintiff, as an indicator panel or a visual signaling apparatus provided by item 685.70, TSUS. Logical reasoning dictates that this device receive the same classification as possessed by all other light emitting diodes, similarly constructed and performing the identical function of visual display in connection with the respective requirements of the specific article in which they must have been incorporated.[5]

Let judgment be entered accordingly.[6]

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[5] The Customs Service has classified visible light emitting diodes as well as liquid crystal diodes, incorporated in numerous other appliances and articles, other than watches and clocks, as indicator panels or visual signaling apparatus under item 685.70, TSUS. Plaintiff's collective exhibit 35.

[6] In its brief, the defendant urges for the first time that if the instant merchandise is not a "dial," then it is properly classifiable as other subassemblies for watch movements under item 720.75, TSUS, or as subassemblies for clock movements under item 720.86, TSUS. Although the holding of this court in the instant proceeding as well as in the companion case of *Texas Instruments Inc. v. United States*, Court No. 77-4-00580, C.D. 4810, precludes the acceptance of this contention, it, nevertheless, must be noted that the incorporation of the foregoing alternative claims in its brief subsequent to trial is belated. As previously noted herein, the record indicates that in the event the classification of the subject merchandise by the Customs Service as "dials" is determined to be erroneous, the Government agrees that the claimed provision of said subject merchandise under item 685.70, TSUS, as electrical indicator panels or visual signaling apparatus is appropriate and correct.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 79–1)

JAMES A. COLE CO., INC. *v.* UNITED STATES

On Plaintiff's Motion to Suspend

Court No. 75–7–01724

Port of New York

[Motion to suspend denied.]

(Dated January 2, 1979)

Barnes, Richardson & Colburn (*Peter J. Fitch* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

LANDIS, Judge: This case raises the question of under what circumstances an action may be suspended under a test case.

The relevant Customs Court rule is 14.7(a): "An action may be suspended pending the final determination of another action (hereinafter referred to as a test case) if it involves an issue of fact or a question of law which is the same as the issue of fact or question of law involved in such test case."

In the proposed test case here, *Pier I Imports, Inc.* v. *United States*, court No. 75–1–00100, the merchandise, fish netting, was classified under TSUS item 386.04: "Articles not specially provided for, of textile materials: Lace or net articles, whether or not ornamented, and other articles ornamented: Of cotton." In said case plaintiff had claimed the proper classification is under TSUS item 355.35: "Fish netting and fishing nets (including sections thereof), of textile materials: Of cotton." In the proposed suspended case, *James A. Cole Co., Inc.* v. *United States*, 75–7–01724, the merchandise was classified under

the same item number as the test case, viz 386.04 TSUS. Plaintiff urges alternatively TSUS item 352.80, "Netting, in the piece, made on a lace, net, or knitting machine, whether or not ornamented: * * * Not ornamented: * * * Other" or TSUS item 359.10, "Textile fabrics, including laminated fabrics, not specially provided for: Of cotton," as the correct classification.

According to the plaintiff, the issue of fact or question of law which is alleged to be the same is: "Whether the merchandise is properly classifiable under TSUS item 355.35." This argument is obviously fallacious. TSUS item 355.35 is only the claimed provision in the proposed test case, whereas, in the proposed suspended case, TSUS item 355.35 does not appear. Therefore under plaintiff's theory, there is no common question of law or fact between the two cases.

The motion of plaintiff to suspend is denied.

(C.R.D. 79–2)

ARMSTRONG BROS. TOOL CO. ET AL. *v.* UNITED STATES (GREAT NECK SAW MANUFACTURING, INC., PARTY-IN-INTEREST)

Opinion and Order on Plaintiffs' Motion to Compel Discovery

Court No. 77–8–02004

[Secretary of Treasury directed to transmit documents to Court for *in camera* inspection; defendant's request to file immediate appeal denied.]

(Dated January 4, 1979)

Frederick L. Ikenson for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (***Joseph I. Liebman*** and ***Sidney N. Weiss***, trial attorneys), for the defendant.

NEWMAN, Judge: This is an American manufacturers' action brought pursuant to 28 U.S.C. 1582(b)(1970), 28 U.S.C. 2632(a) (supp. V, 1975) and 19 U.S.C. 1516(c) (supp. V, 1975), involving the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq. (1970 and supp. V, 1975)). For the background of this litigation, reference is made to my prior opinion in *Armstrong Bros. Tool Co. et al.* v. *United States, etc.*, 80 Cust. Ct. 160, C.D. 4751, *modified on rehearing*, 81 Cust. Ct. 162, C.R.D. 78–14 (1978).

Plaintiffs, initially by means of a request for production of documents under rule 6.4, and now by a motion to compel discovery under rule 6.5, seek access to six documents in the files of the Treasury

Department. Defendant claims that portions of these six documents are nondiscoverable on the ground of executive privilege. In support of its claim of executive privilege, defendant has submitted an affidavit executed by the Secretary of the Treasury. Plaintiffs contend that any possible executive privilege pertaining to the six documents was waived since "[d]efendant has not filed any motion for a protective order, as it should have done". (Plaintiffs' memorandum at 3.)

I

The contentions of the parties have been considered in the following factual context. On September 11, 1978, defendant identified 95 documents in response to plaintiffs' request for production, and advised plaintiffs that it would not produce the 6 documents involved herein. Respecting these six documents, defendant's response states that plaintiffs had agreed to give defendant an additional 2 weeks extension (up to Sept. 25, 1978) in which to make a claim of privilege or assert other objections to production of the six documents. On September 25, 1978, defendant served plaintiffs with expurgated copies of the six documents and a covering letter explaining:

> The documents have some sections deleted. The Secretary of the Treasury has decided to claim privilege as to those portions inasmuch as they contain intra-office staff advice and opinions. In addition the deleted sections do not contain factual matter.
>
> In addition the last paragraph on page 3 of the April 7, 1975, memorandum has been deleted because it contain [sic] information totally irrelevant to this case. It relates to another case. Also, the parenthetical portion of the third full paragraph on page 2 of the March 19, 1975, memorandum has been deleted because it too contains information irrelevant to this case. It refers to another case.
>
> We are not making any claim of confidentiality as to the portions of the documents being supplied to you.

In essence, then, defendant has supplied plaintiffs with unexpurgated copies of 89 documents, along with expurgated versions of the 6 documents in question in this motion involving a claim of executive privilege.

II

As noted above, in support of their argument that defendant waived any possible claim of executive privilege, plaintiffs point out that defendant has not filed a motion for a protective order pursuant to rule 6.1 (c). That rule reads:

> (c) *Protective Orders*: Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

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undue burden or expense, including, but not limited to, one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret, or confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Defendant, on the other hand, insists that under rule 6.4(b) it was proper to claim executive privilege by interposing an objection to plaintiffs' request for production, as was done in the instant case, and that the filing of a motion for a protective order was not required. Rule 6.4(b), so far as pertinent, provides:

(b) *Procedure:* * * *

The party upon whom the request is served shall serve a written response within a period designated in the request, not less than 30 days after the service thereof or within such shorter or longer time as the parties may agree or the court may allow. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless it is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under rule 6.5 with respect to any objection to or other failure to respond to the request, or any part thereof, or any failure to permit inspection as requested.

As is readily apparent, rule 6.4(b) explicitly provides for the assertion of objections to a request for production of documents. Thus, although a motion for protective order under rule 6.1(c) may serve as a procedural vehicle for interposing a claim of executive privilege, the Government may also assert its claim of privilege by a timely objection to the request for production of documents. See Wright & Miller, "*Federal Practice and Procedure*" : Civil section 2213 (1970). If the party seeking discovery wishes to challenge the claim of privilege raised as an objection to production, it may do so by a motion to compel discovery under rule 6.5, as plaintiffs have proceeded to do in the instant case. Thereupon, the court will rule on the motion to

compel, and determine the question of privilege. Cf. *Broadbent* v. *Moore-McCormack*, 5 F.R.D. 220, 222 (E.D. Pa. 1946).

Here, it is undisputed that plaintiffs granted defendant an extension of time until September 25, 1978, to assert a claim of privilege or make other objections to plaintiffs' request; and that defendant asserted a claim of executive privilege in its covering letter of September 25, 1978, with respect to the deleted portions of the six documents furnished to plaintiffs. Under these circumstances, plaintiffs' contention that defendant has waived any privilege is without merit.

The two decisions upon which plaintiffs rely are plainly distinguishable from the facts presented here.

In *Intercontinental Fibres, Inc.* v. *United States*, 69 Cust. Ct. 337, C.R.D. 72-27 (1972) Judge Watson, construing rule 7.3 pertaining to the taking of depositions upon oral examination, treated defendant's objections to plaintiff's motion for a deposition as a cross-motion for a protective order. However, it must be recognized that rule 7.3 does not expressly provide for objections "addressed to the motion to take a deposition," whereas here the Government followed rule 6.4(b), which specifically provides for objections "addressed to the request for production of documents."

In *Airco, Inc.* v. *United States*, court No. 76-3-00643, Judge Richardson, inter alia, denied the Government's motion for leave to file out of time a motion for a protective order based on a claim of privilege.[1] Unlike the present case, in *Airco* the Government admittedly failed to object or claim privilege in response to plaintiff's request for production of documents, as contemplated by rule 6.4(b), but instead stated that it would comply with plaintiff's request.

Plainly, here the defendant has followed a correct procedure in asserting the Secretary's claim of privilege as an objection to plaintiffs' request for production of documents pursuant to rule 6.4(b). Consequently, there has been no waiver by defendant of any executive privilege pertaining to the six documents in dispute.

III

Turning to consideration of the merits of defendant's claim of executive privilege:

In support of its claim, defendant has filed an affidavit by the Secretary of the Treasury formally asserting executive privilege with respect to each of the six documents "to the extent they contain advice, recommendations, or statements of views and opinions by officials and staff members of the Treasury Department." Among other things, the affidavit recites the Treasury's need for confidentiality in the decision-making process in connection with antidumping investigations, and the serious injury to the U.S. Government that would

[1] Unpublished order entered June 1, 1978.

result if the advice, recommendations, or statements of views and opinions contained in the documents were disclosed publicly.

It is well established that the executive branch is privileged to withhold disclosure of intragovernmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated. The foregoing privilege, however, is not absolute but is qualified. Thus, consideration of a claim of executive privilege requires a delicate balancing of competing interests. On the one hand, there is the public's interest in preserving confidentiality to promote intragovernmental candor which is necessary for orderly functioning of the Government; on the other hand, there is the individual's need for disclosure of the particular information sought. And in the absence of proper demonstration of need for production of the privileged matters which outweighs the harm that disclosure may do to intra-governmental candor, the claim of privilege should be sustained. *Sprague Electric Company* v. *United States* (Capar Components Corp., Party-in-Interest), 81 Cust. Ct. 168, C.R.D. 78–18 (1978) and cases there cited. Here, plaintiffs have failed to show any need for disclosure, and indeed have not even challenged the merits of defendant's claim of privilege.

As mentioned above, certain portions of the six documents involved herein have been deleted by defendant. Although the Secretary states in his affidavit that each of six documents "contain advice, recommendations or statements of views or opinions, of various officials and staff members of this [the Treasury] Department," the Secretary's affidavit does not "specifically" aver that the "deleted portions" comprise advice, opinions, and recommendations.[2] Executive privilege, fundamentally, does not apply to purely factual data prepared for intra or interoffice use which would not compromise military or state secrets. *EPA* v. *Mink*, 410 U.S. 73, 87–88 (1973); *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. 347, 350–52, C.R.D. 73–9, 358 F. Supp. 273 (1973). Even factual material included in deliberative memoranda, generally, has been held discoverable if susceptible to severance from its context. See *Smith* v. *F.T.C.*, 403 F. Supp. 1000, 1015 (D. Del. 1975).

Where discovery is resisted, as in the instant case, courts frequently examine documents "in camera" in order to determine whether they should be held in a confidential status or be disclosed to the party seeking production. *United States* v. *Nixon*, 418 U.S. 683, 714–16 (1974); *EPA* v. *Mink*, 410 U.S. 73, 88 (1973); *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978); *Verrazzano*

[2] Parenthetically, defendant's covering letter of Sept. 25, 1978, served with the 6 expurgated documents states: "The Secretary of the Treasury has decided to claim privilege as to those [deleted] portions inasmuch as they contain intra-office staff advice and opinions. In addition the deleted sections do not contain factual matters."

Trading Corp. v. *United States*, 69 Cust. Ct. 307, 314, C.R.D. 72-19, 349 F. Supp. 1401 (1972); *Sun Oil Company* v. *United States*, 514 F. 2d 1020, 1024-25 (Ct. Cl. 1975). However, "in camera" inspection is not to be utilized automatically in every case. *EPA* v. *Mink*, *supra*, at 92-93.

As we have seen, defendant claims that "portions" of the six documents sought by plaintiffs are nondiscoverable on the ground of executive privilege. In certain cases where courts have utilized the "in camera" procedure for determining claims of executive privilege, "it appeared, before the inspection was ordered, that the claimant was entitled to some amount of discovery," and it was necessary to separate the privileged and unprivileged materials. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 332 (D.D.C. 1966), aff'd sub nom. *V.E.B. Carl Zeiss, Jena* v. *Clark*, 128 U.S. App. D.C. 10, 384 F. 2d 979 (1967), cert. denied, 389 U.S. 952 (1967). Here, plaintiffs are concededly entitled to a severable but undelineated portion of the six documents involved. It is, of course, for the Court and not the Secretary of the Treasury to decide whether the expurgated portions of the documents are privileged as claimed by defendant. Cf. *Sprague*, *supra*, and cases cited. While the foregoing proposition may be self-evident, at times there is value in reiterating the obvious.

In light of the interplay of the various factors involved herein, and under all the facts and circumstances, it is appropriate that the Court examine the six documents "in camera" without deletions in order to determine whether plaintiffs should have access to any portion of the matters expurgated by defendant. Indeed, there can be no doubt of the propriety of such "in camera" inspection. *Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *United States* v. *Nixon*, 418 U.S. at 706. Accordingly, at this time there is no basis for granting defendant's request for an immediate appeal pursuant to 28 U.S.C. 1541(b) (1976).

In view of the conclusions reached, it is hereby ORDERED:

(1) That the Secretary of the Treasury shall within thirty (30) days of the entry of this order prepare and transmit under seal to the clerk of the U.S. Customs Court certified copies of the six documents identified in the Secretary's affidavit. These copies shall be in complete and unexpurgated form.

(2) The unexpurgated copies shall be inspected by the court "in camera" together with the expurgated copies heretofore submitted by the parties for the purpose of considering defendant's claim of executive privilege and determining whether the expurgated portions should be disclosed to plaintiffs.

(3) Defendant's request to file an immediate appeal pursuant to 28 U.S.C. 1541(b) is denied at this time.

(C.R.D. 79-3)

NADEL & SONS TOY CORP. *v.* UNITED STATES

On Plaintiff's Request for a Written Opinion or a Statement of Findings of Fact and Conclusions of Law

Court Nos. 66/56409, etc.

[Request denied.]

(Dated January 10, 1979)

Mandel & Grunfeld (*Steven P. Florsheim* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Robert H. White*, trial attorney), for the defendant.

MALETZ, Judge: In this case, the court on December 18, 1978 denied plaintiff's motion for summary judgment "on the ground that genuine issues of fact exist which require a trial." Plaintiff has now filed a "request" that the court "issue a written opinion or a statement of findings of fact and conclusions of law concerning the court's denial" of its summary judgment motion. For the reasons that follow, the request is denied.

In support of its request, plaintiff argues that by reason of 28 U.S.C. 2638(a) "where, as in the instant matter, a judge of the U.S. Customs Court denies the relief requested in a dispositive motion (such as a motion for summary judgment), the judge is *required* to state the reasons for his decision, either through a written opinion or findings of fact and conclusions of law." [Italics added.] The argument is totally untenable.

28 U.S.C. 2638(a) provides:

> A decision of the judge in a contested case shall be supported by either (1) a statement of findings of fact and conclusions of law, or (2) an opinion stating the reasons and facts upon which the decision is based.

This provision, however, is applicable only to a *final* decision of a judge of this court, i.e., a decision which is appealable as a matter of right. This is evident from the language of 28 U.S.C. 2638(b) which provides that "the decision of the judge is *final and conclusive*, unless a retrial or rehearing is granted * * * or an appeal is made to the Court of Customs and Patent Appeals * * *." [Italics added.] See also H. Rept. 91-1067 (91st Cong., 2d sess., 1970) page 21.

It is to be added that the denial of a motion for summary judgment is of course not a final decision but an interlocutory order, an appeal from which may not be had in the absence of certification. Considered in that light, plaintiff's argument carried to its logical conclusion would

lead to the absurdity that any interlocutory order—even an order granting or denying an extension of time for filing a brief—must necessarily be accompanied by an opinion or findings of fact.

The fact of the matter is that whether the court should or should not render an opinion or findings of fact to accompany its denial of a motion for summary judgment is entirely within the discretion of the court. This is demonstrated by rule 8.2(e) of the court which reads as follows:

> (e) *Action Not Fully Adjudicated on Motion.*—If, on motion under this rule, judgment is not rendered upon the whole action and a trial is necessary, the court may ascertain (if it is practicable to do so upon the basis of examining the pleadings and the evidence before it and interrogating counsel) what material facts exist without genuine controversy and what material facts are actually in good faith controverted. It shall thereupon, if practicable, make an order specifying the facts that appear to be without genuine controversy, and they shall be deemed established for all purposes in the action.
>
> The court may make any other order as may aid in the disposition of the action.[1]

Plaintiff further argues that a court opinion is necessary to apprise it as to what issues require trial. Such information, plaintiff says, is required so as to enable it to bring the case to a conclusion in the most efficient, speedy and inexpensive manner possible. But this argument misconceives the basic function of this—or any other article III court. For it is not the function of an article III court to render advisory opinions; rather, the function of an article III court is to decide cases and controversies.

Finally, plaintiff states that since the Customs Courts Act of 1970, it has been the generally accepted practice of this court to issue opinions upon denial of motions for summary judgment which usually have been published as "Customs Rules Decisions" (C.R.D.) and concludes that the instant matter merits a "C.R.D.". It is quite true that on numerous occasions the court has issued such opinions. However, this has been done as a matter of court discretion; it is not a required procedure.

[1] Compare rule 56(d) of the Federal Rules of Civil Procedure.

(C.R.D. 79–4)

SPRAGUE ELECTRIC COMPANY *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST)

Memorandum Opinion and Order

Court No. 77–9–03056

[Defendant's motion for protective order denied as to document "h"; defendant's request to file immediate appeal denied.]

(Dated January 25, 1979)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

NEWMAN, Judge: On December 27, 1978, I granted defendant's motion for a protective order concerning seven documents in the files of the United States International Trade Commission (ITC), predicated upon a claim of executive privilege asserted by the Chairman of the Commission; and additionally ordered that the Secretary of the Commission transmit an eighth document under seal for an "in camera" inspection for the purpose of further considering defendant's claim of executive privilege respecting a portion of that document. Defendant's alternative request to file an immediate appeal pursuant to 28 U.S.C. 1541(b) was denied at that time. *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 81 Cust. Ct. 168, C.R.D. 78–18 (1978).

Pursuant to the order of December 27, 1978, the Secretary of the ITC has transmitted under seal two certified copies of the eighth document (such document designated as "h" in exh. A annexed to the affidavit of the Chairman of the ITC), one copy constituting a complete and unexpurgated document, and the other copy having excised therefrom a portion of the second paragraph which defendant claims contains privileged matter.

I have made an "incamera" inspection of document "h," and following the principles articulated in my prior opinion, C.R.D. 78–18, have determined that the excised portion of the second paragraph is not privileged. Accordingly, it is hereby ORDERED that defendant's motion for a protective order is denied with respect to the deleted portion of the second paragraph of document "h," and defendant shall make available to plaintiff a certified copy of document "h," without deletion, within ten (10) days of the entry of this order.

I am clear that the imperatives of 28 U.S.C. 1541(b) are not present: This dispute does not involve a controlling question of law as to which there is substantial ground for difference of opinion, nor would an immediate appeal from this order materially advance the ultimate determination of this litigation. Hence, defendant's alternative request to proceed by way of an immediate appeal is denied.

(C.R.D. 79–5)

FLINTKOTE COMPANY, GLENS FALLS DIVISION *v.* UNITED STATES (INDEPENDENT CEMENT CO., PARTY IN INTEREST)

American Manufacturer's Action

Court No. 79–2–00304
(Dated February 23, 1979)

Barnes, Richardson & Colburn (*Andrew P. Vance* and *Michael A. Johnson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Velta A. Melnbrencis*, trial attorney), for the defendant.

Pope Ballard & Loos (*Thomas A. Rothwell, Jr., Edgar T. Bellinger* and *Joseph A. Vicario* of counsel) for the party in interest.

Citadel Cement Corporation, Northeast Cement Division (*Shearman & Sterling—W. Foster Wollen, Donald L. Cuneo* and *David J. Mark* of counsel) as *amicus curiae*.

Lake Ontario Cement Limited and *Rochester Portland Cement Corp.* (*Barry Cohen; Arter Hadden & Hemmendinger; Arter & Hadden—Neal Rains, William Silverman* and *Paul Friedman* of counsel) as *amici curiae*.

Genster Ltd. (*Williams & King—William K. Ince* and *Burton R. Thorman* of counsel) as *amicus curiae*.

Memorandum Decision and Order

RICHARDSON, JUDGE: Plaintiff, an American manufacturer of Portland hydraulic cement, commenced this action pursuant to 19 U.S.C.A., section 1516(c) by the filing of a summons on February 14, 1979, affecting entry No. 209946 dated February 2, 1979, which covers a duty-free importation of Portland hydraulic cement at St. Albans, Vt., from Canada. The action contests a decision of the Secretary of the Treasury (Secretary) made pursuant to section 1516(c) denying plaintiff's petition urging the imposition of dumping duties on Portland hydraulic cement of Canadian origin following a no-injury determination of the U.S. International Trade Commission (ITC).

Presently before the court is a motion brought on by order to show cause on February 16, 1979, in which plaintiff urges the court, among other things, to order pursuant to 28 U.S.C.A., section 1651 (commonly known as the All Writs Act) the cancellation of liquidations on which appraisements have been made or the withholding of appraisement and liquidation of other entries of Portland hydraulic cement from Canada pending the final disposition of this action, which, as previously indicated, affects but a single entry. Plaintiff contends that the relief sought on the motion is necessary to bar removal from this court's jurisdiction of cement entries which would otherwise be subject to the court's judgment in the action but for the operation of the liquidation process that was set into motion when the Secretary ordered the resumption of appraisement theretofore withheld during the pendency of the antidumping investigation. Plaintiff asserts that this court is

authorized under the All Writs Act to grant the "equitable" relief prayed for in the nature of mandamus and injunction "in aid of" the court's jurisdiction over entry No. 209946 that comprises the basis for judicial review in this action of the no injury determination of the ITC (which action precluded publication of a "dumping" finding by the Secretary and resulted in the termination of the antidumping investigation). This posture has generated multiple responses on the instant motion on the part of the defendant and the party in interest as well as from *amici curiae*, all of whom, like plaintiff, have filed memoranda of law ably articulating their respective contentions.

After careful consideration of all arguments brought to bear on the motion before the court, including a transcript of the rather extensive oral arguments heard by the court on the return of the order to show cause on February 16, the court is constrained to deny the motion in all respects.

The relief sought under the motion is entirely "equitable" in nature. As this court and our appellate court have consistently held, "the Customs Court is a court of limited statutory jurisdiction which lacks equitable powers." See, *Matsushita Electric Industrial Company, Ltd., et al.* v. *The United States Treasury Department et.al.*, 67 Cust. Ct. 328, and cases cited on page 329, C.D. 4292, aff'd., 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402(1973), cert. den., 414 U.S. 821 (1973). Indeed, plaintiff has conceded as much in its moving papers when, in exhibit F of counsel's affidavit dated February 14, 1979, the court's attention was called to plaintiff's complaint before the U.S. District Court for the Northern District of New York (78CV640) [1] in which plaintiff averred over counsel's signature:

> 23. The U.S. Customs Court is without the equitable power to grant an injunction on the facts presented here.
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> * * * * * * *
>
> 28. Because the Customs Court, and its appellate tribunals, have decided that said court does not have the power to grant injunctive relief herein * * * this Court has jurisdiction to grant such relief *pendente lite* in the Customs Court and its appellate tribunals.

Before this court plaintiff asks for "an order in the form of mandamus," which, when the type of relief it is seeking is considered, is a request for a mandatory injunction—an equitable relief—which the Customs Court cannot grant.

This jurisdictional void is not removed through the All Writs Act. Thus, in the most recent case to come before this court on facts not unlike those at bar, also involving a single entry by means of which plaintiff attempted to reach "all present and future entries of plaintiff's

[1] In the district court plaintiff sought essentially the same equitable relief it seeks under the instant motion. By decision (Foley, J.) handed down on Feb. 16, the date of oral argument of the instant motion, that court declined jurisdiction by reason of the existence of an adequate legal remedy in the customs court under sec. 1516(c).

merchandise of the type involved in this action" via the All Writs Act, the court denied plaintiff's motion for an order compelling action on the part of the Government with respect to such other entries. See, *Dexter* v. *United States*, 78 Cust. Ct. 179, C.R.D. 77-1; 424 F. Supp. 1069 (1977). In the *Dexter* case Judge Watson said:

> The All Writs Act does not give this court jurisdiction to require anyone to satisfy the preconditions of jurisdiction. It only gives the court instruments with which to effectuate existing jurisdiction.

And in applying the *Matsushita* rationale to *Dexter* Judge Watson went on to say:

> * * * Until the entries are liquidated and protests denied *this court has no jurisdiction over them, not even by way of its jurisdiction over another entry of exactly the same merchandise.* (Italic added.)

Precisely the same ruling is required on the instant motion as in *Dexter*, and for the same reasons which prompted the court to decline to compel the Government to liquidate entries of merchandise not before the court.

Even if the court possessed equitable powers to invoke the All Writs Act here in the manner sought by plaintiff, its exercise would be in conflict with the clear congressional intent manifest in 19 U.S.C.A., section 1516, and as such, inappropriate. The statutory scheme set forth in section 1516 is neither vague nor ambiguous. Thus, under section 1516(c) Congress provided for judicial review of a negative antidumping determination as to only one entry per port, while providing under section 1516(e) for appraisement, withheld during the pendency of an antidumping investigation, to proceed following a negative determination of antidumping notwithstanding the pendency of judicial proceedings to review such determination, and further providing under section 1516(g) for suspension of liquidation only when this court or its appellate tribunals determined that the Secretary or the ITC had erred.

Therefore, even if plaintiff ultimately succeeds in this action in its challenge to the negative injury determination, dumping duties ensuing therefrom would only have prospective application, that is, only to Portland hydraulic cement from Canada "which is *entered* for consumption or withdrawn from warehouse for consumption *after the date of publication of the court decision.*" (Italic added.) Consequently, the suspension of appraisement and liquidation of any such merchandise entered or withdrawn for consumption before such "date of publication" perforce of injunctive and mandamus relief obtained in a judicial proceeding could not properly result (by means of retroactive application) in subjecting the judicially suspended entries to the court's judgment without doing violence to the congressional plan.

This is not to say that the plaintiff or any other American manufacturer does not have just cause to be aggrieved by the fact that neither the Customs Court nor the district court has jurisdiction to grant equitable relief in a situation such as this case presents. Prior to enactment of the Customs Courts Act of 1970, Public Law 91–271, every American manufactuer enjoyed the "very substantive right" to reach every entry of imported merchandise of a class or kind produced by it, if it were so inclined, under an American manufacturer's appeal for reappraisement [2] instituted in this court pursuant to former section 1516(a). See, 19 U.S.C., section 1516(a), 1964 edition, and compare, *Airco Speer Division, Air Reduction Company, Inc.* v. *United States* (*Matsushita Electric Corp. of America, Party-in-Interest*), 64 Cust. Ct. 737, R.D. 11710 (1970), embracing eight entries. However, with the advent of the 1970 act this substantive right was eliminated with the deletion of section 1516(a) as then constituted, and this, notwithstanding the fact that the House Judiciary Committee report stated that the revision was intended "to reflect the consolidation of appraisal and classification procedures within the Bureau of Customs, *but is not designed to have substantive effect on the rights of the parties under existing law.*" (Italic added.) See, 1970 U.S.C. Cong. & Adm. News, vol. 2, p. 3217 (H. Rept. No. 91–267, 91st Cong., 2d Sess.).)

The present action is, of course, a testimonial to the fact that the Government's representation, as plaintiff's counsel states, was in error. Needless to say, that if the language of 1516(a) with respect to all entries had not been deleted, plaintiff would not be in court seeking the list of entries which have not been made available to him, though requested.

For the reasons expressed above it is

ORDERED, that plaintiff's motion for an order in the form of mandamus and injunction, and for certain ancillary relief, pursuant to the All Writs Act, 28 U.S.C.A. 1651(a), be, and hereby is, denied.

(C.R.D. 79–6)

MICHELIN TIRE CORPORATION *v.* UNITED STATES

Memorandum Opinion and Order on Defendant's Motion for Summary Judgment

MOTION FOR SUMMARY JUDGMENT

The court denies a motion for summary judgment which, by its emphasis on restrictions on the court's power to decide issues of fact and law in a countervailing duty action, resulted in the unclear and incomplete presentation of the issues in the case.

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[2] Appeal to reappraisement was the most frequently used method of obtaining judicial review of adverse antidumping determinations. See, *Amtorg Trading Corporation* v. *United States*, 21 CCPA 532, T.D. 46975 (1934); *United States* v. *European Trading Co.*, 27 CCPA 289, C.A.D. 103 (1940); *Ellis K. Orlowitz* v. *United States*, 47 Cust. Ct. 583, A.R.D. 136 (1961), aff'd, 50 CCPA 36 C.A.D. 816 (1963); *Maher-App & Co.* v. *United States*, 64 Cust. Ct. 598, R.D. 11690 (1970).

COUNTERVAILING DUTY—SCOPE OF TRIAL IN THE CUSTOMS COURT

All relevant issues of fact and law are subject to trial in a civil action contesting the denial of an administrative protest against the assessment of countervailing duty. This includes the issue of the existence of a bounty or grant.

BOUNTY OR GRANT—SCOPE OF TRIAL IN THE CUSTOMS COURT

The existence of a bounty or grant is a statutory prerequisite to the assessment of countervailing duties. The Customs Court is the exclusive judicial forum for the determination of the existence of a bounty or grant. The court is not restricted to reviewing the record of an administrative investigation into the existence of a bounty or grant. The court is not confined to deciding whether the result of the administrative investigation was unreasonable, arbitrary or capricious.

CIVIL ACTION—COUNTERVAILING DUTY

In its determination of the court's power to try all issues of fact and law in a civil action the court relies on, and discusses, the relevant statutes, the case law, the recent and remote history of the action for recovery of duty as well as the action's constitutional implications. The court distinguishes and criticizes restrictions expressed in flexible tariff and antidumping duty cases. The application of principles of limited judicial review of administration action to proceedings in this court is rejected in a discussion of *Suwannee Steamship v. United States*, 70 Cust. Ct. 327, C.R.D. 73-3 (1973).

Court No. 75-9-02467

[Motion denied.]

(Dated February 26, 1979)

Windels, Marx, Davies & Ives (*Paul Windels, Jr., John Y. Taggart* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, *Joseph I. Liebman* and *Edmund F. Schmidt*, trial attorneys, for the defendant.

WATSON, Judge: This matter is before the court on defendant's motion for summary judgment.

Plaintiff commenced this action pursuant to 28 U.S.C. 2632 to contest the denial of its administrative protest against the assessment of countervailing duties on tires it had imported from Canada. The levy of that additional duty was made pursuant to section 303 of the Tariff Act of 1930.[1] In general terms, the involved statute requires the assessment of additional duty when a bounty or grant is bestowed on the manufacture, production, or export of an imported article.

In the motion for summary judgment defendant argues that this court is restricted to reviewing the facts contained in the record of the

[1] Act of June 17, 1930, ch. 497, title III, pt. I, sec. 303, 46 Stat. 687 (current version at 19 U.S.C. 1303 (1977)).

Secretary of the Treasury's administrative investigation into the question of the existence of a bounty or grant. Defendant further argues that this court is limited to judging whether the resulting decision of the Secretary of the Treasury [2] was unreasonable, arbitrary, or capricious.

Defendant also seeks a summary judgment without regard to the asserted restrictions on the court's power to try the issues in the case. However, defendant's continued emphasis on such restrictions led plaintiff to concentrate on this point. This resulted in an imprecise and incomplete confrontation between the opposing contentions. In its present form the motion does not present a clear formulation of the dispute and does not persuade the court that material factual issues are entirely absent.

To a certain extent the awkwardness of the motion and the confusion it engenders is derived both from defendant's insistence on a restricted court proceeding and from plaintiff's preoccupation with the conduct of the administrative investigation in which the Secretary of the Treasury found that a bounty or grant was being bestowed on these tires.

Once it is made clear that this is an independent action in which this court has the power to determine all disputed questions of fact or law concerning the correctness of the assessment of this additional duty, the court expects the confusion to dissipate. However, the fact that a question as to this court's power to try the issues in this case is being repeatedly raised [3] and vigorously pressed by the Government more than 80 years after the creation of countervailing duty legislation [4] indicates that a state of confusion exists, or is developing, with regard to the function of this court.

Therefore, the court believes that this matter needs fundamental reexamination in order to restore the proper focus of this action; encourage the complete resolution of its issues; and generally clarify this aspect of proceedings in the court.

Defendant bases its contentions on an argument that judicial inquiry in this action is governed by general principles of judicial review of administrative actions. Defendant argues that under those principles and, in the case of statutory silence on the matter, (particularly in the absence of a specific provision for trial de novo), the scope of judicial "review" is confined to the administrative record, or is shaped by the

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[2] T.D. 73-10.

[3] Defendant's earlier motion to limit the scope of trial, in essentially the same respects as are advanced in this motion was denied in *Michelin Tire Corporation* v. *United States*, 81 Cust. Ct. 157, C.R.D. 78-12 (1978).

[4] Tariff Act of 1897, ch. 11, section 5, 30 Stat. 205.

particular administrative proceeding being "reviewed." Defendant also argues that the restrictions it espouses have been applied to the role of this court in cases involving duty assessed under the flexible tariff provisions (sec. 336 of the Tariff Act of 1930, 19 U.S.C. 1336) and the Antidumping Act of 1921 (19 U.S.C. 160 et seq.)

Defendant also relies upon a recent decision of this court in which general principles of judicial review of administrative action were utilized as the basis for a finding of subject matter jurisdiction. *Suwannee Steamship Co.* v. *United States*, 70 Cust. Ct. 327, C.R.D. 73–3 (1973).

Defendant's arguments go on to include the alleged latitude given to the Secretary of the Treasury in making his investigation into the existence of a bounty or grant; the purported exercise by the Secretary, of judgments in the political, legislative, or policy spheres; and the asserted futility of the administrative investigation if the issue is tried "de novo" before this court.

In this opinion the court concludes that this action is an independent civil action commenced and conducted in the form and manner provided by statute.

Examination of the basic and related statutory terminology shows clearly that this court is to determine all relevant issues of fact and law in actions within its subject matter jurisdiction. It is further determined that this judicial proceeding is not a mere review of a record created on the administrative level and is not a review in an appellate sense of any particular administrative action or proceeding. The purported restrictions on this court's power to try and judge all relevant issues of fact and law are found to be without support in the statutes and case law. In fact, those sources support the opposite conclusion. Moreover, historical analysis shows that this type of action existed "before" the administrative process of which defendant would make it a mere review. Thus, the correct view of this action is derived from the statutory expressions of legislative intent, the case law, and the true historical nature of the action. In light of these fundamental sources of the court's authority the administrative phase affects the conduct of these judicial proceedings in only two respects. First, the content of the administrative activity defines the subject matter jurisdiction of the court and second, the exhaustion of the remedies offered on the administrative level is a procedural requirement for the commencement of the independent action in this court. Beyond that, the administrative phase has no bearing or influence on the manner in which this court determines issues of fact and law.

Issues are before this court as a result of the commencement of an independent civil action provided by Congress, not by virtue of the

operation of the Administrative Procedure Act (5 U.S.C. 551, et seq.) or pursuant to general principles of judicial review of administrative actions. Accordingly, restrictions on judicial inquiry derived from those sources are inapplicable.

Restrictions expressed in decisions regarding other areas of customs law are either unclear, distinguishable, or based on outmoded considerations. Arguments founded on unusual or discretionary powers purportedly given to the Secretary of the Treasury in matters of countervailing duty are erroneous.

The court concludes that, within the subject matter jurisdiction granted to it by Congress, it is the exclusive, unlimited, and unrestricted forum for the determination of all relevant issues of fact and law. Its powers are unaffected by the manner in which some issues may have been decided on the administrative level.

I. The Statutes

A. 28 U.S.C. 2632

The proper starting place for determining the complete nature of a judicial proceeding in this court is the statute which allows the commencement of the action, namely 28 U.S.C. 2632(a):

> A party may contest denial of a protest * * * by bringing a civil action in the Customs Court.

The very existence of a statutory starting point for analyzing the nature of an action before this court as a distinct action, is a matter of importance. For prior to the enactment of section 2632 in 1970 [5] there was no statutory provision for the commencement of an independent action in this court. Instead, the court was simply the automatic recipient of the papers in a dispute commenced on the administrative level. Briefly stated, the prior statutory provisions for the administrative review of decisions contained a further step directing the transmittal of the final administrative decision together with the entry and the accompanying papers to the Customs Court for judicial resolution. See for example, section 515 of the Tariff Act of 1930, in the pre-1970 form.[6]

This was a reflection of the fact that the court was a continuation of the Board of General Appraisers. The Board was an administrative tribunal which conducted hearings of Customs disputes with "the incidents of a trial in court." [7] It developed from legislation passed in 1890 [8] which provided for a level of administrative review by "general

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[5] Public Law 91-271, title I, sec. 113, 84 Stat. 279.
[6] Act of June 17, 1930, ch. 497, title IV, pt. III, sec. 515, 46 Stat. 734.
[7] Justice Cardozo used this phrase in *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294 (1932).
[8] Act of June 10, 1890, ch. 407, 26 Stat. 131.

appraisers" and subsequent appeals to the circuit courts (the district courts of the time.) [9] The evolution of the court from the Board of General Appraisers, the court's inheritance of the Board's antiquated and convoluted forms of hearings, and the lack of a clear separation from the administrative process, may have tended to retard the perception of the court as an independent judicial institution. If the circumstances of this court's evolution had any part in the development of a mistaken impression as to its powers, the impression was eliminated by Congress in the 1970 legislation.[10] The legislative history of that act displays a profound awareness of the archaic forms within which this court was functioning. The Senate committee report noted that "[i]n many respects, the court has continued to function as would an administrative tribunal reviewing the actions of the Bureau of Customs, despite the fact that in 1958 Congress declared it to be an article III court." [11]

In 1970 Congress did not simply create a civil action where none had existed before. Among other things, it eliminated the single characteristic of this court which most impeded the recognition of its full independent judicial powers. The 1970 law ended the automatic receipt of administrative disputes, the most glaring vestige of the entanglement of the court's immediate predecessor with administrative procedures. Since 1970 it is no longer possible to mistake this court for an appendage of the administrative process. Now, in the subject matter assigned to it by Congress, this court unequivocally represents the judicial power of the United States under article III of the Constitution. The 1970 act ended any possible implication that the scope of the action in this court was influenced or governed by the form of prior phases of administrative proceedings.

It is not only by contrast with the anachronistic manner in which this court formerly received disputes that section 2632 is an important development. By its own terms and by the meaning of its plain lan-

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[9] For a time these "appeals" were, in effect, trials because the introduction of new evidence was permitted in the circuit courts. This ended when appeals were restricted to the record before the Board of General Appraisers. Act of May 27, 1908, ch. 205, sec. 2, 35 Stat. 403, 404. In 1909 the Court of Customs Appeals was created to hear those appeals from decisions of the Board of General Appraisers. Act of Aug. 5, 1909, ch. 6, sec. 29, 36 Stat. 11, 105. The restriction of the appeals to the record before the Board corresponded with the institution of complete trials before the Board of General Appraisers, as if it were a court in all but name. See, T.D. 34666—G.A. 7589 (1914).

[10] Other peculiarities derived from the Board of General Appraisers were eliminated in the 1970 act. Notable among them were entirely separate procedures for classification cases (decided by a three-judge "division"—even when heard outside New York by a single judge) and value or "appraisement" cases (decided by a single judge with a right to review before a three-judge "appellate term" of the court itself). In addition, in appeals from the Customs Court, the Court of Customs and Patent Appeals would judge the facts as well as the law in classification cases. See, S. Rept. No. 91-576, 91st Cong.; 1st sess. 13 (1969); H. Rept. No. 91-1067, 91st Cong., 2d sess. 12 (1970).

[11] S. Rept. No. 91-1067, 91st Cong., 2d sess. 3 (1970).

guage, section 2632 expresses the existence of an unrestricted trial of all issues in actions commenced in this court.

The use of the term civil action is of paramount importance. The right to bring an action in court, be it of common law or statutory origin, is obviously indivisible from the right to a trial of the issues in that action. This can be viewed either as a right of the litigant or a power of the court. In this regard, Mr. Justice Grier stated that "[i]t is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the case * * *." *Peck et al.* v. *Jennes et al.*, 48 U.S. (7 How.) 612, 624 (1849).

If the right of action is expressed in a statutory form, it is reasonable to expect any restriction on the right to a trial of the issues to be similarly expressed. It cannot be presumed that, without any indication whatsoever, Congress designed an action which is intended to fluctuate on trial in accordance with the extent to which the issues may or may not have been explored on the administrative level.[12]

The fact that the civil action provided for in 28 U.S.C. 2632 raises issues which may have been touched upon in earlier administrative stages, does not diminish the significance of the term "civil action." For example, the statutory term "civil action" has been held to require a trial de novo when used to describe the law suit which can be brought following an adverse administrative determination (after a full quasi-judicial hearing) of an employee's discrimination complaint. *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

The *Chandler* case resolved a conflict between the decisions of the courts of appeals concerning the nature of the judicial proceeding provided by section 717(c) of the Civil Rights Act of 1964.[13]

The statute permitted a Federal employee who had complained of employment discrimination to file a civil action against the head of the appropriate agency following either an adverse administrative determination of the complaint or administrative inaction. The Supreme Court reversed the lower courts' holdings that the statute did not require a trial de novo. The Supreme Court rejected the view that the statute would be satisfied by a mere review of the administrative record. In so doing, the Supreme Court relied on the plain meaning of the statute, the statement of the action in terms of the civil action available to private-sector employees (which was already established as de novo) and the legislative history. The Supreme

[12] Care must be taken not to confuse the restriction on the subject matter jurisdiction of the court (which is abundantly clear) with restrictions on the trial of issues which arise "within" its proper subject matter jurisdiction.

[13] As added by sec. 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. 2200(e)-16(c) (1970 ed., supp. IV).

Court singled out the "specific statutory authorization of a civil action" to distinguish the circumstances from those in which de novo review was not presumed. It thereby also distinguished cases involving review of agency action under the Administrative Procedure Act and cases in which the standards to be used or procedures to be followed were set forth in the relevant statutes.

The Supreme Court's distinction of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), is particularly instructive. In the *Bianchi* case the Supreme Court held that Congress intended to limit judicial review when it provided in the Wunderlich Act [14] that the decision of a government agency on a question of fact arising under a "disputes" clause of a government contract, would be final and conclusive "unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." In contrast, the Supreme Court characterized section 717(c) of the Civil Rights Act of 1964 as follows: [15]

> Here Congress has not "simply provided for review" but has affirmatively chosen to grant federal employees the right to maintain a trial de novo.
>
> In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like "substantial evidence" which has "become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." [Citation omitted.]

In the circumstances presented in this countervailing duty action there are many additional, positive indications of the completeness of the judicial proceedings.

The use of the phrase "contest the denial of a protest" has in it no indication of any limitation on the trial of issues arising in this litigation. Literally, the phrase means to dispute the refusal to grant the requested relief, after that relief has been sought in the vehicle provided for administrative review. This statutory language is the broadest possible expression of the content of the civil action, given the fact that under the statute administrative relief must be exhausted before a civil action can be commenced.

The action is therefore brought to contest the administrative refusal to grant relief. Beyond that refusal the nature of the particular administrative decision, action or proceeding which led to the dispute, has no bearing on the manner in which the court conducts the trial of the civil action. The civil action was not expressed by Congress as a function, or outgrowth, or contest of any single, underlying adminis-

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[14] Act of May 11, 1954, 68 Stat. 81.

[15] *Chandler* v. *Roudebush*, *supra*, p. 862, n.37.

trative step. The power of this court to try the action is therefore the power to decide any issue which is relevant to a proper judicial decision. Suppositions as to how a particular issue would be decided if a court was to scrutinize it in the absence of a specific, distinct statutory procedure, are irrelevant.

It is particularly significant that the action is commenced in this court to "contest," not to "review." The former word carries no implication of restriction to a record and has no meaning other than a complete challenge to the final denial of relief at the administrative level. Congress has shown a complete familiarity with its power to restrict "reviews" in other areas by providing a specific provision for scope of review. See for example, the scope-of-review provision applicable to certain orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board and the Federal Trade Commission, 15 U.S.C. 21(a) or, of course, the scope-of-review provision of the Administrative Procedure Act, 5 U.S.C. 706. Congress provided nothing of this sort with regard to actions in this court. In fact, Congress eliminated an appearance of the word "review" in the course of its 1970 revision. It repealed 28 U.S.C. 1583 [16] which formerly gave this court jurisdiction "to review on protest the decisions of any collector of customs." It should be noted that the repealed language never gave rise to reviews of records in the sense desired by defendant. It was, in all probability, a use of the word review in its most general sense. In any event, the present statute, shorn of any references to review, no longer allows even room for confusion on this point.

In addition to the very existence of this action and the plain meaning of the statutory language under which it is commenced, support for the unlimited nature of the trial of all issues of facts and law also derives from the requirement of consistency in the interpretation of statutes.

This civil action could raise factual issues which originate in agency action taken after the administrative investigation and countervailing duty order of the Secrerary of the Treasury, i.e., the identity and quantity of the subject merchandise, the date of exportation and country of exportation or the f.o.b. value of each tire on the date of importation. As to these potential issues, the defendant concedes a "de novo" trial because these matters were decided by the district director without the creation of an administrative record. But it is not "who" makes the particular decision, or the degree to which administrative records are fashioned in the various phases of the administrative process which determines the court's scope of trial—"not when a single, specific

[16] Act of June 25, 1948, ch. 646, sec. 1, 62 Stat. 943.

statutory cause of action has been provided which is not related to any one phase or level of the administrative proceeding." Indeed, if this were not the case the Secretary of the Treasury could, by administrative fiat, determine the extent to which the judicial power of the United States will apply to decisions made by him or his subordinates. This could be done by the simple expedient of making any chosen determination the subject of a recorded investigation on the administrative level. Carried to its logical conclusion defendant's reasoning would permit the Secretary of the Treasury to conduct an administrative investigation into a question of valuation or classification; make a record; issue a ruling or order, and the subsequent court trial of the issue so decided would be confined to a review of the administrative record and limited to deciding whether the ruling was "reasonable."

Defendant's attempt to distinguish between the trial of a classification or valuation dispute and a countervailing duty dispute founders on the same statutory shoals. The very same civil action that challenges the one, also challenges the other, and the statute itself draws no distinction between these challenges. Congress expressed no special treatment for matters which may have been the subject of investigation, or the subject of some recorded proceeding by the administrative agency.

There is no indication whatsoever in the statute to suggest that the nature of the trial of certain issues in these civil actions is to fluctuate in accordance with the manner in which the matter is treated at the administrative level. In fact, as noted earlier, even if the denial of the protest was based on a quasi-judicial hearing the right to a civil action would mean a trial de novo, in accordance with the reasoning in *Chandler*, and in the absence of any contrary expression of legislative intent.

The attempted distinction between the trial of classification and valuation issues and certain countervailing duty issues will not be imputed to a statutory scheme which expresses no distinctions between them. Such an attempt would only generate confusion and lack of uniformity in a statutory plan designed to foster a comprehensive, consistent, and exclusive system of justice in tariff matters.

If, as defendant concedes, this civil action could raise a number of separate issues, some subject to complete trial while others would be decided upon a review of an administrative record, the source of this purported disparity in the scope of the trial obviously is not the single statute which allows the action.

B. Statutes Governing the Power of the Court

We turn next to those statutes pertaining to the powers of the court and its conduct of actions commenced before it. In those sup-

porting provisions there are further indications of the court's power to try all issues of fact and law and no indication of limitations. In this respect, the technique used in *Chandler* of analyzing the related statutory terminology employed by Congress [17] is revealing. We find the statutes replete with references to trials and devoid of any potentially limiting expressions such as "review." Thus, in 28 U.S.C. 253, the Chief Judge of the Customs Court is empowered to designate judges to "try any case" and in 28 U.S.C. 255 he is authorized to designate three-judge panels in certain cases to "hear and determine any civil action * * *." and in 28 U.S.C. 256 to designate udges to preside at a "trial or hearing."

In 28 U.S.C. 1582 the Customs Court is given exclusive jurisdiction of the civil actions authorized by section 2632. While in itself this provision is of interest for the indication it gives of the subject matter jurisdiction of the court, it is of greater nterest because of what it replaced. As noted earlier, the prior statute (28 U.S.C. 1583) gave the court exclusive jurisdiction "to review on protest the decisions of any collector of customs." While this was no certain indication of a lesser scope of trial than presently exists, it clearly indicates the vestiges of the court's administrative origins, and perhaps the origin of the confusion which persists today as to its powers.

In 28 U.S.C. 2637 the parties before this court are given the right to introduce evidence "*in any proceeding.*" [18] This right in itself is a clear indication that none of the actions conducted in this court are restricted by statute to a preexisting record. *Hugo Stinnes Steel and Metals Co.* v. *United States*, 80 Cust. Ct. 175, C.D. 4753, 453 F. Supp. 94 (1978) appeal pending.

C. 19 U.S.C. § 1303

The Countervailing duty statute

Having found evidence of an unrestricted trial of all issues in the statutes dealing with this cause of action and with the court's powers, we move to the statutes which provide for the administrative assessment of countervailing duty and for the related proceedings in customs administrative review.

The first statute examined is the statute pursuant to which the Secretary of the Treasury made the determination of the existence of a bounty or grant; the determination which led to the order upon which the assessment of duty contested in this action was based.

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[17] 425 U.S. at 845.

[18] Although this provision explicitly contradicts defendant's argument for restriction to an administrative record, it merely states the obvious. Actually, this provision is a relic of a time when it was needed to furnish this elementary right in an administrative proceeding in which it might not otherwise have been available. See, sec. 28, subsec. 13, Tariff Act of 1909, act of Aug. 5, 1909, ch. 6, sec. 28, subsec. 13, 36 Stat. 99, 100. See also, sec. III, subsec. M, Tariff Act of 1913, act of Oct. 3, 1913, ch. 16, sec. III, subsec. M, 38 Stat. 187. It could hardly be argued that a special statutory provision is needed to allow parties to introduce evidence and cross-examine witnesses in an independent action in Federal court.

Section 303, Tariff Act of 1930, act of June 17, 1930, C. 497, title III, part I, section 303, 46 Stat. 687.

> Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article of merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article of merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however, the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

There is nothing in this statute which indicates a restriction of the court's power to independently determine the existence of a bounty or grant if that issue arises in a civil action. In fact, this provision makes no mention of any particular means by which the existence of a bounty or grant was to be determined. The argument that the statutory scheme was for the ultimate legal action to be a review of the record of an administrative investigation is therefore highly problematical.

It should be noted that a formal investigation was not required until the 1975 amendment, which expanded the administrative procedures to be followed in arriving at a determination of the existence of a bounty or grant.[19] But even had some statutory mandate for formal investigation existed at the time relevant to this action, it would not have shown any legislative intention that the result of the investigation (or the fact that there was an investigation) should influence or control the scope of a later trial.

D. Customs Administrative Statutes

Of the statutes dealing with administrative proceedings in customs matters, 19 U.S.C. 1514, which provides for the finality of administrative decisions, is of basic importance.

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[19] Act of Jan. 3, 1975, Public Law 93-618, title III, ch. 3 sec. 331(a), 88 Stat. 2049.

If there were to be an expression of restriction of a later trial of issues arising from administrative action this is one of the places where one would expect to find it. In relevant part 19 U.S.C. 1514 reads as follows:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
> (5) the liquidation or reliquidation of any entry, or any modification thereof;
> (6) the refusal to pay a claim for drawback; and
> (7) the refusal to reliquidate an entry under section 520(c) of this act [19 U.S.C.S. 1520],
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this action, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the U.S. Customs Court in accordance with section 2632 of title 28 of the United States Code [28 U.S.C.S. 2632] within the time prescribed by section 2631 of that title.

This provision is completely free of any legislative expression of the standards by which the disputed administrative decisions are to be judged in court. The contrast between this provision and the provision for the finality of agency decisions under the Wunderlich Act, discussed in connection with *United States* v. *Bianchi & Co.*, *supra*, is clear. This provision does not contemplate judicial review of administrative records and does not contain any expressions which would limit the inherent power of the court to decide all issues of fact and law arising in the actions before it.

Moreover, section 1514(a) explicitly makes the finality of "all orders and findings entering into the [decisions of the appropriate customs officer]" subject to a civil action commenced in this court. It would be difficult to fashion a more complete expression of the totality of administrative activity which is subject to challenge in court. In conjunction with 28 U.S.C. 2632 this provision forms part of a distinct statutory scheme in which the action for judicial relief in these tariff areas was specifically expressed by Congress without limitation or restriction. Accordingly, those cases expressing standards of judicial review for administrative proceedings in the absence of distinct statutory provisions granting access to the courts [20] and those cases

[20] *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

dealing with statutes that explicitly restrict review [21] are distinguishable.

II. Countervailing Duty Cases

As mentioned at the outset of this opinion, it is also important that the restrictions espoused by defendant have not been adopted by the courts although a history of litigation on the subject of countervailing duties exists. The passing mention [22] of "the administrative record we review in this case," in a ruling on the admission of evidence, is tenuous support for so important a restriction and must be viewed as an unexplained deviation from the norm.

In a number of countervailing duty cases it is clear that factual evidence was introduced in this court, in addition to that which was gathered by the Secretary of the Treasury. Such alleged generators of bounties and grants as a Uruguayan multiple exchange rate [23] and German currency values and trade practices [24] have been the subject of proof on trial in the court.

In fact, the matter was explicitly discussed in *V. Mueller & Co.* v. *United States*, 28 CCPA 249, C.A.D. 152 (1940) in which the Court of Customs and Patent Appeals held that the Secretary of the Treasury, in making a decision to order the assessment of countervailing duties did not have to set forth the particular manner in which the bounty or grant was paid or bestowed. The court then stated: (28 CCPA 257)

> We do not mean to be understood as holding the appellant [importer] had not the right to bring forward any questions of fact relating to the transaction and have them tested by the applicable law, but *the burden of showing the facts in detail rested upon it*, and it was not incumbent upon the secretary to go further than he went in this regard. [Italic supplied.]

Generally, in cases involving the assessment of countervailing duties the parties have always had the right to introduce evidence concerning the factual issues in the case. If, for the most part, they chose to rely on the facts ascertained by the Secretary of the Treasury, the reliance was not under compulsion but was only due to a lack of dispute as to the facts. Needless to say, the right to introduce evidence in court is possessed by both parties and both may conceivably benefit from the exercise of that right.

It is also clear that this court's standard of judging the question of the assessment of countervailing duty has always been the standard

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[21] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.* v. *United States*, 435 U.S. 519 (1978).

[22] In *American Express Co.* v. *United States*, 67 Cust. Ct. 141, 143, C.D. 4266 (1971) *aff'd* 60 CCPA 86, C.A.D. 1087 (1973).

[23] *Energetic Worsted Corp.* v. *United States*, 51 Cust. Ct. 55, C.D. 2413 (1963) reversed. *Same* v. *Same*, 53 CCPA 36, C.A.D. 874 (1966).

[24] *F. W. Woolworth Co.* v. *United States*, 3 Cust. Ct. 236, C.D. 244 (1939), affirmed. 28 CCPA 239, C.A.D. 151 (1940).

of correctness under the law. See, *Zenith Radio Corp.* v. *United States*, 437 U.S. 433 (1978). That standard of decision is the traditional standard for legal actions which are not mere reviews of administrative records.

The less rigorous standard of whether the action or determination of the Secretary of the Treasury was reasonable, arbitrary, or capricious is not applicable in these matters. That lesser standard generally may apply in judicial review obtained under the Administrative Procedure Act or general principles of judicial review of administrative actions. As must be reiterated, this action is an independent civil action, not derived from rights or powers of "review" in the limited sense.

Because the action in this court is an independent civil action and because the civil action is not stated in terms of review of any particular administrative proceeding and does not contain any limitations on scope or standard of review or references to external sources of any kind, there is no reason to look to the Administrative Procedure Act or general principles of judicial review of administration action. Congress was quite capable of specifying the applicability of the Administrative Procedure Act in this area if it chose to do so. As noted earlier, Congress was equally conversant with those terms which might indicate the existence of something less than a complete trial of all the issues.

If the court is to make an independent judgment as to whether the statutory conditions existed for the assessment of the contested duty it cannot be confined to an administrative record.[25] This is particularly the case when that record is not required by statute. The fact that plaintiff here may have been allowed to submit information in the investigation does not affect the analysis that the statutory scheme contemplates that the first mandatory, unrestricted hearing of all disputed issues of fact and law shall be in the Customs Court.

In sum, the scope of authority of this court is not limited to reviewing administrative records. This court does not review the record of a proceeding by which the protest was denied. It does not review the record of a proceeding by which the duty was assessed. It does not review the record of the proceedings in which underlying facts such as the existence of a bounty or grant were determined. It does not review *anything* in the sense of a review confined to a record. It hears and determines the factual and legal issues in an independent action.

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[25] To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the fact finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus, the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding these rights.

Speiser v. *Randall*, 357 U.S. 513, 520, 521 (1957).

III. The Historical and Constitutional Aspects of the Action

Defendant's argument for restrictions on the scope of trial in the form of limiting the court to review of the record of an administrative investigation and to a "reasonableness" standard of decision overlooks other important aspects of this action. These are the true object of the action, its historical nature, and its due process implications, all of which are interrelated.

The true practical and historical purpose of this action is the recovery of duty alleged to have been unlawfully exacted. The action is not generated by the investigation of the Secretary of the Treasury or the conclusion it reached. In fact, plaintiff had to wait until the Secretary's decision that a bounty or grant was being bestowed became embodied in an exaction of duty and until its administrative protest against that exaction was denied before it could commence an action in this court. Plaintiff had and has no right to immediate judicial review, directed at the administrative determination that the articles it was importing or planning to import were benefiting from a bounty or grant. Accordingly, there is absolutely no reason to subject the additional aggrievement to limitations which imply that the action was only aimed at the initial administrative determination. In reality, plaintiff has resorted to an action which is the current statutory substitute for the common-law actions by which excessive duty payments originally were recovered. As such, there are definite constitutional limits to the alterations which may be made in the trial of the action. See, *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 343 (1936).

Originally, an action to recover duties was a common-law action in "assumpsit," with trial by jury based on an implied promise by the Government official (the Collector of Customs) to refund money which the law did not authorize him to collect.[26] *Elliot* v. *Swartwout*, 35 U.S. 103, 10 Pet. 137 (1836). *Cf. Stone* v. *White*, 301 U.S. 532, 534, 535 (1936).

The collectors began accumulating enormous funds to protect themselves against possible liability. In some cases, defalcations and embezzlements occurred. This led to the passage of a law in 1839 requiring the collectors to pay the collected duties immediately to the U.S. Treasury.[27] That act also provided that "* * * whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector * * * than the law requires should have been paid, it shall be his duty to draw his warrant

[26] In its historical analysis this opinion relies heavily on material contained in Joseph E. Lombardi's "The United States Customs Court—A History of Its Origin and Evolution" (1976) (U.S. Customs Court Library).

[27] Act of Mar. 3, 1839, ch. 82, sec. 2, 5 Stat 339, 348-349.

upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated." In *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845) the Supreme Court held that this statute terminated the common-law action against the collector. However, strong dissents by Justices Story and McLean led quickly to an explanatory act [28] in which Congress declared that nothing in the 1839 law should be construed as taking away from the importer the right to maintain an action at law against the collector provided the payment was made under protest.

Although the rationale of Justice Story's dissent is not fully reflected in the recent Customs law decisions, it is nevertheless a reminder that there is an irreducible core of legal rights possessed by one who has been subjected to an illegal duty by government officials. The courts are the only secure safeguard for those rights. This was the jurisprudential ground upon which Justice Story relied when he stated at 44 U.S. 253:

> I know of no power, indeed, of which a free people ought to be more jealous than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens.

Justice Story's opinion was discussed in a law review article by Judge George Stewart Brown of this court. 26 Va. L. Rev. 759 (1940). The following perceptive comments are found at page 767.

> This brilliant opinion by Judge Story is seldom quoted by lawyers in their briefs, and by judges in their opinions, probably because of the conventional report of it as a dissent, although it would often be appropriate authority in cases dealing with the intent and purpose of Congress in establishing a statutory judicial review in matters of taxation, in substitution for the common law remedies. This is probably because the legal incident, the subject of this paper, through the prompt action of Congress, which made it the law of the land so soon after being filed, is not generally known. Certainly a dissenting opinion which thus immediately became the law is sound authority to quote.
>
> The original common law remedy for the recovery of taxes illegally collected was so broad and all inclusive upon both questions of fact as well as questions of law that to give a narrower, less inclusive construction to the present statutory remedies would seem to be inadmissible as in degradation of the common law. *Statutes giving a right to sue the government where no remedy existed before, such as many matters coming before the Court of*

[28] Act of Feb. 26, 1845 (5 Stat. 727, also in footnote at 5 Stat. 349).

Claims, are, of course, subject to a strict construction. The converse, however, is true about statutes which perfected and improved and made applicable to modern conditions, an ancient common law remedy which had always existed, to protect the citizens' elementary right not to be taxed illegally.

There is a widespread and spirited discussion now going on in the Law Reviews over what is called administrative law, governing suits between the government and its citizens. The particular phase of administrative law now being extensively debated is how far, that is, to what extent, should there be a judicial review of administrative governmental action. *Mr. Justice Story in the quoted opinion presents seemingly unanswerable arguments that, so far as taxation is concerned, which may be in a class by itself, such judicial review of administrative action must necessarily include a review of the facts as well as the law in order to be effective and to establish complete justice between the citizen and his government.* [Italic supplied.]

The principles expressed by Justice Story continued to be followed by Congress in later years. In 1864, legislation continued the right of action against the collector but the maintenance of the action was not allowed unless an appeal to the Secretary of the Treasury was decided, or not acted upon, within certain time limits.[29] This development was characterized as follows in *Arnson* v. *Murphy*, 109 U.S. 238, 243 (1883):

> * * * [I]t is apparent that the common-law action recognized as appropriate by the decision in *Elliot* v. *Swartwout*, * * * has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, *if not originated by the act of Congress*, yet is regulated, as to all its incidents, by express statutory provisions. [Italic supplied.]

The decision in the *Arnson* case was to preclude the application of a "State" statute of limitations to the Federal action for recovery of duties. Inherent in the Supreme Court's opinion was the recognition that the original common-law action was at the core of the statutory procedural framework.

The *Arnson* opinion also reveals that the statutory action was related to the nascent administrative review only insofar as the administrative steps were a procedural prerequisite to the commencement of a court action. The court action, therefore, clearly was not a review of administrative proceedings but was the statutory continuation of a preexisting common-law right of action.

In the Customs Administrative Act of 1890 the function of the Secretary of the Treasury, in deciding disputes regarding the pay-

[29] Act of June 30, 1864, 13 Stat. 214:

An earlier 1857 law displayed a similar framework but not in connection with disputes as to the amount of duty and is therefore not regarded here as the origin of the administrative review prerequisite to the commencement of an action. See, *Barney, Collector* v. *Watson, et al.*, 92 U.S. 449 (1875).

ment of duty at the administrative level, was transferred to nine general appraisers.[30] Although this act ended the availability of a trial by jury, the availability of a full trial before a court was maintained by a provision allowing the introduction of new evidence for use by a circuit (district) court in reviewing the questions of law "and fact" involved in the decision of the general appraisers.[31]

Thereafter, the general appraisers gradually took on the basic powers of a court so that when appeals to the circuit court were limited to the record of the Board of General Appraisers [32] and when the Court of Customs Appeals was created in 1909 and substituted as the exclusive appellate tribunal in Customs lawsuits, the Board of General Appraisers occupied the position formerly held by the circuit (district) courts.[33] The same act that created the Court of Customs Appeals specifically gave the Board the powers of a circuit (district) court to conduct trials. Thus, the right to a complete trial of the relevant issues was maintained, albeit on the administrative level.

Although a jury trial was eliminated, the proceeding before the Board was a simulacrum of the proceeding formerly held in a circuit (district) court. In other words, although the trial of issues in a disputed exaction of duty was held at the administrative level, in scope the trial was never intended to be less than a continuation of the complete trial held at common law. Congress never went so far as to transform it into an action of lesser magnitude or a mere review of administrative actions or proceedings.

From this perspective, the later historical occurrences, the formal naming of this court in 1926,[34] the perfection of its independence in the Tariff Act of 1930,[35] its integration into the Federal judicial system in 1948,[36] and the declaration of Congress in 1956 that it was a constitutional court, established under article III of the Constitution [37] all represent a single consistent line of development. The common purpose was to harmonize the court's forms and powers with the actions it tried.

The legislative history of the 1956 act showed a clear recognition of the fundamental nature of the actions belonging within the subject matter jurisdiction of the Customs Court. The report of the House Committee on the Judiciary [38] stated in part as follows:

> The Customs Court, and its predecessor, the United States Board of General Appraisers, has jurisdiction in a class of cases

[30] Act of June 10, 1890, ch. 407, sec. 12, 26 Stat. 131
[31] Id., sec. 15.
[32] Act of May 27, 1908, ch. 205, sec. 2, 35 Stat. 403 404.
[33] Act of Aug. 5, 1909, ch. 6, sec. 29, 36 Stat. 11.
[34] Act of May 28, 1926, ch. 411, 44 Stat. 660.
[35] 47 Stat. 596-737.
[36] Act of June 25, 1948, ch. 646, 62 Stat. 869, 899.
[37] Act of July 14, 1956, ch. 589, 70 Stat. 532.
[38] H. Rept. No. 2348, 84th Cong., 2d sess. 2, reprinted in (1956) U.S. Code Cong. & Ad. News, vol. 2, 3122 3123.

in law which arise under the Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority. *This subject matter has always been a type of case at law to which the judicial power extended by virtue of article III of the Constitution of the United States. The customs cases within the jurisdiction of the court have also been controversies to which the United States was a party and to which the judicial power attached.*

There has never been any revisory power in the executive or legislative branch of the Government over the judgment of the court or its predecessor, the Board of General Appraisers. The judgments of the court have always been final and conclusive and binding on all parties interested, including the United States and all of its officers.

Thus the committee is of the opinion that this legislation should be enacted to remove all doubt as to the status of the Customs Court as a court established under article III of the Constitution. [Italic supplied.]

This short historical review shows that there has been a steady, continuous clarification by Congress of the position and power of this court. The action in this court, as it has emerged from its historical permutations, is still the statutory substitute for the common law action for recovery of duty. This court itself has emerged as the equivalent of the district courts in the trial of these matters.[39]

In the 1970 act Congress further perfected this equivalence. The independent right of action emerged from the indistinct state in which it had existed for 80 years. The proceeding in this court is now called by its rightful name, a civil action. The action is now recognized as the latest embodiment of a proceeding which had a historical and legal existence antedating the administrative process. It is not subordinate to, or a further step in, the administrative process. It does not take its shape therefrom.

The only relationship between the two is one of procedural sequence and jurisdictional definition. The administrative process must be completed before the right of action in court can be asserted and only those matters which are protested on the administrative level can come within the subject matter jurisdiction of the court.

Thus, any claim that the trial of issues in this action is limited to a review of administrative investigations, or that the court's function is restricted to an evaluation of "administrative reasonableness" runs counter to the true historical nature of the action for the recovery of duties. Such a claim is inconsistent with a long line of manifest legis-

[39] The exclusion of the subject matter jurisdiction of the Customs Court from that of the district courts in 28 U.S.C. 1340 is a further reflection of this state of affairs:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenues, or revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court.* [Italic supplied.]

lative intent that a forum be available for the complete trial of such cases, and that the forum be equipped with the powers necessary to insure a complete trial of all issues.

The restrictions advocated by defendant would also present serious constitutional problems. To the extent that the present action is still a statutory substitute for an original common law action, a further alteration of the action to the point where a principal issue is finally determined only by means of an administrative investigation would destroy the last vestiges of a complete judicial hearing. Thus, the basic fairness of the substituted proceeding would be placed in question. See, *Anniston Mfg. Co.* v. *Davis, supra*. The Supreme Court has expressed its concern "that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v. *McElroy*, 360 U.S. 474, 496 et seq., 509 (1958).

In addition, the proposed restrictions would raise the spectre of a deprivation of property without due process of law. Presently, this judicial forum is the guarantor of due process of law in the determination of disputes involving import duties. *Dart Export Corp. et al.* v. *United States*, 43 CCPA 64, C.A.D. 610 (1956). This availibility of due process of law is required whether or not the importation of merchandise itself is characterized as a right or a privilege. *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Moreover, regardless of whether there is a constitutional status to the right to import merchandise, those who engage in importation have a right to be free of illegal and excessive exactions of duty. Elementary fairness requires the same or equivalent process of law for relief from illegal and excessive exactions of duty as for illegal and excessive assessments of taxes in the domestic sphere. See, 26 U.S.C. 7422 in conjunction with 28 U.S.C. 1346. See also, 26 U.S.C. 6213.

In sum, the restrictions advocated by defendant, contradict the plain meaning of the relevant statutes, are inconsistent with case law and the history of the action, and pose serious constitutional problems.

IV. The Scope of Trial of Other Issues

Defendant's argument for a limitation on the scope of trial of the issue of the existence of a bounty or grant also relies upon limitations expressed with regard to other issues arising in actions in this court. Specifically, defendant refers to cases involving the correctness of tariff treatment under the flexible tariff provisions of section 336 of the Tariff Act of 1930 and the Antidumping Act of 1921.

Both of these tariff statutes have a certain structural resemblance to the assessment of countervailing duty. Generally speaking, the

assessment of these duties is made pursuant to an administrative determination which follows other statutorily required administrative investigations into underlying conditions. Under the flexible tariff provisions the proclamation by the President of a change in duty is preceded by a report of the International Trade Commission. This report considers whether the existing tariff rate fails to cure an imbalance between the costs of production of domestic and foreign products and recommends a modification necessary to remedy this condition. In the case of antidumping duties, the assessment of duty is made following a determination by the Secretary of the Treasury that certain merchandise is being sold at less than fair value and a determination by the International Trade Commission that an American industry is being injured thereby. (Both determinations were formerly made by the Secretary of the Treasury.)

Careful study of the decisions expressing or perpetuating the concept of a limitation on the scope of trial of certain issues reveals to the court that the reasons offered for the limitations are either entirely distinguishable, incapable of exact determination, or so rooted in outdated procedures and particular historical antecedents that they are no longer consistent with present circumstances.

A. Flexible Tariff

The rationale offered for a limited scope of trial in actions contesting duty assessments under the flexible tariff statutes was based on statutory interpretation. In holding that the Customs Court may not judge the correctness of the Tariff (Trade) Commission's use of a particular period of time for the ascertainment of the value of the Japanese yen (for the purpose of determining the Japanese cost of production) the Supreme Court in *United States* v. *Bush & Co.*, 310 U.S. 371 (1940) stressed the discretionary nature of the subsequent Presidential decision to proclaim a rate modification. It found the legislative grant of this discretion in the statutory use of the words "if, in his judgment." In the view of the *Bush* decision this indicated an intention to make the President's judgment and the underlying facts immune from judicial scrutiny.

The existence of presidential discretion in proclaiming a tariff modification distinguishes the flexible tariff from the countervailing duty. In countervailing duty the Secretary of the Treasury has no discretion in ordering the assessment of additional duties. *American Express, Co.* v. *United States*, 60 CCPA 86, 93, 472 F. 2d 1050 (1973).

It should be carefully noted that the freedom of the Secretary of the Treasury to decide how to investigate the existence of the bounty or grant is not the sort of discretion on which the Supreme Court relied.

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The Supreme Court in *Bush* found discretion in making the "ultimate" decision, not discretion in how to conduct a preliminary investigation.[40]

Therefore, the presidential discretion in flexible tariff matters is distinguishable from the power of the Secretary of the Treasury in countervailing duty matters.

In addition, further study of the presidential "discretion" calls into question whether it is indeed a legislative expression of the insulation of the underlying facts from judicial scrutiny. When the flexible tariff provision of section 315 of title III of the Tariff Act of 1922 [41] was first challenged as an unconstitutional delegation of legislative power to the President it was upheld by the Supreme Court on the grounds that "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Hampton & Co.* v. *United States*, 276 U.S. 394 at 409.

The Supreme Court followed with an approving repetition of the reasoning used forty years earlier to uphold the constitutionality of legislation granting the President power to suspend the free importation of certain articles. The court stated as follows (p. 410):

> [N]othing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a *named contingency*. What the President was required to do was merely in execution of the act of Congress. It was not the making of law. *He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.* [Italic supplied.]

It therefore seems that "lack" of discretion in its application saved the flexible tariff from unconstitutionality, while the "existence" of discretion in its application insulated the substance of the flexible tariff determination from judicial scrutiny. A possible reconciliation of this apparent contradiction is to consider the *Bush* decision as actually focusing on the power of the President to select a new rate. The calculation of the change in rate needed to equalize differences in the domestic and foreign costs of production would be the judgment which the *Bush* decision saw as discretionary and immune from judicial probing. But the underlying determination that the condition exists which requires the proclamation of a new rate, (i.e., the "existence" of a difference between the foreign and domestic costs of production which is not equalized by the statutory duties) is the "named

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[40] If the sort of thing the Secretary of the Treasury does in deciding how to go about investigating the existence of a bounty or grant is considered discretionary in the full sense, then practically everything done in customs administration can be considered discretionary and the facts underlying any administrative decision will be insulated from judicial scrutiny. The trial of even basic classification and valuation actions in this court could thereby be thrown into disarray.

[41] Act of Sept. 21, 1922, ch. 356, 42 Stat. 858, 941.

contingency" or the declared "event" or the "intelligible principle" to which the act of the President must conform. Thus, the phrase "in his judgment" refers to the judgment by the President that the proposed rate changes will equalize the differences in costs of production, not to a judgment he makes that the differences exist.

This court should, under this analysis, judge whether the contingency named in the statute had occurred. This court would not be doing so as a form of review over the Trade Commission or the Presidential decision but in the exercise of its judicial powers to judge a fundamental issue in a lawsuit challenging the ultimate imposition of duty. The fundamental issue would be whether the conditions described in the statute as a necessary basis for the change of tariff rate did, or did not, exist.

In this respect the court's function would be the same as it is in a countervailing duty case or in any other case in which it is judging an issue of conformity to a statutory standard. Did an inequality in costs of production exist? Did a bounty or grant exist? Did an export value exist? Did a chief use exist? The development of distinctions between the trial of these issues is artificial and inconsistent with the statutory scheme now in effect. It is also inimical to the existence of a clear and uniform system of justice in tariff disputes.

It may be observed in passing that even this reconciliation of the *Hampton* case and the *Bush* case does not fully resolve the problems posed by the latter case. The only complete answer may be that the measure of discretion discerned in *Bush* was sufficient to preclude judicial scrutiny only in light of the formerly indistinct legislative expression of the judicial power in that area. Important changes have since taken place, among which are the congressional clarification of the status of this court and the recognition of the independent and distinct nature of the actions over which it has jurisdiction.

A consistent and uniform standard of justice now requires that no issue arising within the subject matter jurisdiction of this court be insulated from complete examination and determination without the most explicit direction by Congress. If the issue is the conformity of the administrative action to an intelligible principle expressed by Congress it is for this court to decide it. Absent an explicit restriction on the court it does not matter what official or body took the disputed action or with what putative discretion it was taken.

In the area of judicial review pursuant to the Administrative Procedure Act, the Supreme Court has characterized nonreviewability of administrative action as "an exception which must be demonstrated." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1969). See also, *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140, 141 (1966). It follows that when Congress has provided a specific and independent action to

obtain relief from administrative aggrievement and has provided a specialized and exclusive judicial forum, a constraint on the trial of a particular issue must be demonstrated with the utmost specificity.

For these reasons the court would conclude that there are no longer any grounds to perpetuate or expand past restraints on this court on the subject of flexible tariffs, or to limit this court's scrutiny of any issue relevant to the decision of an action within its subject matter jurisdiction.

In addition to its distillation as a product of discretion in *United States* v. *Bush & Co., supra*, the flexible tariff restriction on this court's scope of trial can be followed back in time as well through *United States* v. *S. Leon & Co.*, 20 CCPA 49, T.D. 45677 (1932) and *United States* v. *Sears, Roebuck & Co.*, 20 CCPA 295, T.D. 46086 (1932) to its origin in cases seeking to challenge the value of foreign money as ascertained by the Director of the Mint and proclaimed by the Secretary of the Treasury (*United States* v. *Klingenberg*, 153 U.S. 93 *infra*) and even beyond, to cases seeking to challenge the determination by the Secretary of War that certain bridges were an unreasonable obstruction of free navigation. *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177 (1910).

These cases are also relied upon in decisions expressing a restriction on this court's scope of trial in antidumping duty cases and will be more thoroughly discussed in the next section of this opinion. For the moment, however, it suffices to say that a study of these decisions reveals them to be of questionable relevance today.

B. Dumping Duty

In addition to its reliance on restrictions expressed in flexible tariff cases, defendant relies on restrictions expressed in cases involving antidumping duty. As mentioned, the assessment of antidumping duty is preceded by a dual determination; sales of the importation at less than fair value and resulting injury to a domestic industry. Restrictions on the court's power to judge the facts of the matter, that is to say, whether sales at less than fair value and injury existed have indeed been expressed and followed. Most recently the restrictions have been expressed in the form of discovery orders which apparently indicate that the object of the discovery is to enable this court to review the record of the International Trade Commission's injury finding and to decide whether the finding was "among other things, arbitrary, an abuse of discretion or otherwise contrary to law." *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978). This reflects a line of decision going back, without clarification, through *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973) and *City Lumber Co.* v. *United States*, 59 CCPA 89, 457 F. 2d 991, C.A.D. 1045 (1972) to *Kleberg & Co.* v. *United*

States, 21 CCPA 110, T.D. 46446 (1933). The oft-quoted language of the *Kleberg* decision reads as follows:

> It is equally well established by the authorities that if the Secretary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions. The constitutionality of the law under which he proceeds having been once determined, then the judicial power extends only to a correction of his failure to proceed according to and within the law. *United States* v. *Sears, Roebuck & Co. supra; Clarke* v. *United States*, 17 C.C.P.A. (Customs) 420, T.D. 43866; *United States* v. *Tower & Sons*, 14 Ct. Cust. Appls. 421, T.D. 42058; *United States* v. *Central Vermont Railway Co.*, 17 C.C.P.A. (Customs) 166, T.D. 43474.
>
> This being the state of the law, we are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of. Under the statute, the Secretary was not confined to any particular source of information or means of investigation. Furthermore, such information as he might obtain was not open to public inspection, unless he felt that the public interest so required. *Norwegian Nitrogen Products Co.* v. *United States*, 20 C.C.P.A. (Customs) 27, T.D. 45674, affirmed in 288 U.S. 294.

The above quotation will be referred to as the *Kleberg* restriction. The cases cited in its support show that it has four roots. The first is in flexible tariff cases. The second is in foreign currency value cases. The third is in directed assessment cases, and the fourth is in cases dealing with the power of the Board of General Appraisers in reappraisement matters.

In the sources of its reasoning and in its assumptions, the *Kleberg* restriction represents a concept of judicial power and authority which is no longer an accurate reflection of congressional intent.

The *Kleberg* restriction depends upon an acceptance of the premises that the raising, in this court, of an issue regarding the existence of injury, or sales at less than fair value, implies a review of a particular administrative proceeding. But, as was pointed out earlier in this opinion, when a party contests an assessment of duty and raises the above issues in the Customs Court it does so, not by virtue of a right to judicial review of any particular underlying administrative proceeding, but as the consequence of the right to bring an independent civil action for the recovery of duty. The party therefore has a right to have all the issues in that action tried on the record made before the court. Included in the issues may be the question of whether the conditions named in the statute as prerequisites to the assessment of duty existed or did not exist. The power of an administrative agency to decide that question for itself is not a bar to the determination of that same question by the court, unless the power of the court to decide issues in a civil action is somehow expressly limited. The continued

viability of the *Kleberg* restriction must be questioned in light of the present statutory framework for the trial of issues in independent civil actions. The present statutory arrangement displays no restrictiveness and does not permit the inferences which might have been drawn from the statutory scheme in effect when the cases on which the *Kleberg* restriction is based were decided. We now turn to an examination of those cases.

1. Flexible tariff root

As noted earlier, the flexible tariff issue restriction was crystallized in the *Bush* opinion as being a matter of statutory interpretation. The statute revealed in its language a grant of "discretion" to the President to make a judgment of what new rate of duty would correct a disparity between the costs of production of domestic and foreign articles (when the disparity was not equalized by the existing rate of duty). In this light the antidumping statute is not comparable. In none of its forms [42] did the Antidumping Act grant discretion in the complete sense in which it was found in *Bush*. Accordingly, insofar as the *Kleberg* restriction relies on the flexible tariff restriction, it is subject to the same distinctions and disabilities previously discussed.

2. The foreign currency root

The flexible tariff issue limitation joins the second root of the *Kleberg* restriction, which is the conclusiveness of the Secretary of the Treasury's proclamation of the value of foreign currency (foreign "coin") as estimated by the Director of the Mint. Thus, we move from the "discretion" of an administrative action to its legislatively-intended conclusiveness as the basis of a restriction on the court.

In *Cramer* v. *Arthur*, 102 U.S. 612 (1881) a suit was brought against the collector of Customs at the Port of New York alleging that the collector had overestimated the value of the invoice currency (the Austrian florin) when computing the value of the importation in U.S. money, and had therefore taken an excessive amount of duty. The Supreme Court held that the plaintiff could not attack the currency exchange calculation of the collector because it was done pursuant to a proclamation of the value of foreign coin made by the Secretary of the Treasury in accordance with a statute which provided that the value of standard foreign coins should be estimated once a year by the Director of the Mint and proclaimed on January 1, by the Secretary of the Treasury. The Supreme Court explained that this procedure had replaced prior acts in which Congress itself had set the rate of exchange. It characterized the valuation as binding on the collector and on importers "* * * just as binding as if it had been a permanent

[42] At one time the Secretary of the Treasury determined both whether imported merchandise was sold at less than fair value *and* whether a U.S. industry was being injured as a consequence.
Act of May 27, 1921, ch. 14, title II, sec. 201, 42 Stat. 11.

statute * * * ." (p. 616) It saw utter confusion and uncertainty resulting if every importer could raise the question of the value of foreign money on every invoice.

In a similar situation involving the value of the Mexican dollar in *Hadden* v. *Merrit*, 115 U.S. 25 (1885) the Supreme Court elaborated on the earlier discussion. It found that Congress intended an annual settlement of currency values. It characterized the ascertainment and declaration of currency value as "* * * the performance of an executive function requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision." (p. 27)

Finally, in *United States* v. *Klingenberg*, 153 U.S. 93 (1894) the same issue was discussed in terms of the recently created Board of General Appraisers, i.e., that the collector's action in adopting the value of the gold florin proclaimed by the Secretary of the Treasury was conclusive and therefore was not subject to examination by the Board of General Appraisers.

The foreign currency proclamation can be distinguished on numerous grounds from the underlying investigations in antidumping or countervailing duty matters. It was a direct replacement for a specific congressional proclamation of the rate; it was done only once a year (or quarterly in later years); it was a general determination, unrelated to specific merchandise or specific importations of merchandise; it was certainly not done as part of a process of determining additional duties; and it was based on an estimate.

But the most important distinguishing characteristic of the foreign currency proclamation restriction was the less developed structure of the judicial "review" of the time. The decision in *Klingenberg* sets out the scope of the proceeding before the Board of General Appraisers during that period. Section 14 of the Customs Administrative Act of June 10, 1890, provided that the *decision of the collector* as to the rate and amount of duties would be final and conclusive unless a written objection was made to the collector, whereupon the matter was forwarded to be examined by the board of three general appraisers and decided by a majority of them. An appeal was available to the circuit court (the district court of the time) and a provision existed for the taking of additional evidence for the benefit of the circuit court.

The 1890 act did not contain the language of section 516 of the Tariff Act of 1922 which added the "legality of all orders and findings entering into the same" to the description of what administrative matters were subject to written objection. Thus, the foreign currency restriction, aside from its other distinguishing characteristics, was developed in the absence of a statutory expression of the totality of the decisions which were being subjected to objection and, by exten-

sion, to the scrutiny of the courts. It developed in the absence of a Federal court with exclusive jurisdiction in customs matters and at a time when distinctions between acts of the collector of Customs and acts of the Secretary of the Treasury were considered germane.[43]

In these respects continued reliance on the *Kleberg* restriction, insofar as it is an embodiment of the foreign currency restriction, should be questioned. In its origin it was a reflection of a statutory structure which has since been substantially modified. See generally, *Argosy Limited* v. *Hennigan*, 404 F. 2d 14 (CA 5th 1968), in which the following perceptive comment is made at page 20:

> * * * [T]he jurisdiction of the Customs Court is today considerably more comprehensive than was the jurisdiction of its predecessor, the United States Board of General Appraisers, in 1892. Its jurisdiction not only is exclusive of other courts, but over the years has grown more inclusive whenever matters pertaining to the Customs laws have been concerned. [Footnote and citations omitted.]

3. Directed assessment root

The third root of the *Kleberg* restriction passes through another antidumping case (*United States* v. *Tower & Sons*, 14 Ct. Cust. Appls. 421, 427 T.D. 42058 (1927)), to cases in which importers sought to contest the failure of the Secretary of the Treasury to direct a lower assessment under paragraph I of section 3 of the Tariff Act of 1921. Under that paragraph the collector was forbidden to assess duty on less than the entered value unless he was directed to do so by the Secretary of the Treasury. The Secretary of the Treasury was empowered to direct such assessments in cases where the importer had won a related valuation dispute and had only raised the entered value (now sought to be lowered) in a good faith attempt to conform to the requirements of the appraiser in the related dispute. In such cases it was held that the Secretary of the Treasury's judgment as to whether the facts merited a directed assessment was not reviewable by any judicial tribunal. The reason given was that the Secretary of the Treasury "was vested by Congress with *exclusive* authority to direct that an assessment of duties be made upon an amount less than the entered value * * *" and that he was the "tribunal of last resort." [Italic in original.] *Kurz & Co.* v. *United States*, 13 Ct. Cust. Appls. 527, 530 T.D. 41395 (1926).

The point was made even more explicitly in the earlier case of *Mills & Gibb* v. *United States*, 8 Ct. Cust. Appls. 31, T.D. 37153 (1917), when the court stated at page 38:

> * * * [T]he authority granted to the Secretary by the paragraph in question is distinctly denied to the Collector. That

[43] It should also be noted that the office of the collector of Customs was abolished and its functions transferred to the Secretary of the Treasury in 1965. Reorganization Plan No. 1 of 1965, 30 F.R. 7035, 79 Stat. 1317, pursuant to Reorganization Act of 1949, 63 Stat. 203, as amended.

> officer is neither empowered nor permitted to examine or decide as to the facts upon which the relief of the importers is made to depend * * * [I]t should be remembered in this connection that *it is the action or decision of the collector which may be challenged by protest*, and that this makes up the issue which goes to the board for decision, and which may be appealed to this court.

What we see here then is the insulation of a decision of the Secretary of the Treasury from judicial review based on a narrow and technical limitation of the right of protest to acts or decisions which were *exclusively* those of the collector. The basis for this restrictive view was removed in the Tariff Act of 1921 which, in its expression of what could be protested (section 514) added to the previous bare mention of the "decision of the collector as to the rate and amount of duties * * *" the language *"including the legality of all orders and findings entering into the same."* [Italic supplied.]

In an important comment, the report of the Committee on Ways and Means stated that "The jurisdiction of the Board of General Appraisers * * * is somewhat enlarged by allowing the review of questions which are now exclusively decided by the Secretary of the Treasury." [44]

It is clear therefore that the language "all orders and findings", which continues in the present 19 U.S.C. 1514, is a reminder of the withering of the third root of the *Kleberg* restriction; and an indication of the enduring Congressional intention that the entire fabric of the duty determination is to be subject to judicial scrutiny.[45]

4. The Board of General Appraisers root

The fourth root of the *Kleberg* restriction, if it does anything, tends to support the conclusion that the exercise of power by the Secretary of the Treasury under the Antidumping Act is properly subject to judicial scrutiny. In *United States* v. *Central Vermont Railway Co.*, 17 C.C.P.A. 166, T.D. 43474 (1929) the powers conferred on the Secretary were referred to as "ministerial only" (p. 174) and as calling for the exercise of "no discretion except in methods, and are fact-finding only." The court concluded that the legality of the dumping order could be litigated in a reappraisement proceeding. The issue in that case was simply whether the dumping order could be signed by an Assistant Secretary but the reasoning of the decision was that "any

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[44] Report of the Committee on Ways and Means to accompany H. R. 7456, 67th Congress, 1st sess., H. Rept. No. 248, p. 26.

[45] The devastating dissent of Judge De Vries in *Mill & Gibb* v. *United States*, contains, at p. 51, a notable statement of basic principles.

> The grant of power in the board upon protest to determine the correct amount of duties upon importation *is without limitation.* The act nowhere says that when an illegal amount levied is due to the Secretary's mandate, or any other excepting cause, the board is without jurisdiction, but the grant of power in the board is unlimited, *whatever the cause or whoever causes an illegal amount of duties to be levied.*
>
> Upon due protest, challenging the amount of duty levied, the determination of the legal duty carries with it *the power of inquiry and decision by the board as to all legal performances the result of which entered into and affected the amount of duties levied* and covered by the protest. [First Italic in original; remainder supplied.]

question affecting the appraisement, either as to its amount or legality, is properly before the Customs Court on review." (p. 175)

The search for a clear principle of broad application or lasting validity, at the core of the *Kleberg* restriction, ends without success. In fact, the impression grows that the restriction is honored more from lack of detailed examination than from its enduring validity. It now seems that the more basic, and dominant principle at work in both the historical and recent past of this court is a tendency towards completeness and uniformity of the system of justice in customs matters. At the very least, restricting conceptions which may have been carried forward unquestioningly need to be reexamined thoroughly to consider their validity in light of the present state of the law.

This court either has jurisdiction of an action or it does not. When it does have jurisdiction the statutory scheme clearly provides for the trial of all relevant issues without distinction between them. The issue of whether basic statutory guiding principles have been properly followed or applied is of fundamental relevance to any action and uniquely within the traditional competence of the courts to decide. This issue may arise in any action within the subject matter jurisdiction of this court and, when it does, it should be fully tried unless there is a specific statutory limitation to the contrary.

V. The Suwannee Steamship Cases

Defendant has also cited the cases of *Suwannee Steamship* v. *United States*, 70 Cust. Ct. 327, C.R.D. 73–3 (1973) and *Same* v. *Same*, 79 Cust. Ct. C.D. 4708, 435 F. Supp. 389 (1977), as representing the application of principles of relatively narrow judicial review of administrative actions to issues in this court. In *Suwannee I* the court decided that it had subject matter jurisdiction of an action brought to challenge the refusal of the Secretary of the Treasury to remit duties on ship repairs.[46] *In Suwannee II* it decided the action based on a standard of whether the Secretary of the Treasury's interpretation of the statutory standards governing the remission was "in accordance with the law" and whether his findings as to the underlying facts were unreasonable, arbitrary, capricious, or an abuse of discretion.

In the view of this opinion the reliance in *Suwannee I* and *II* on principles of general administrative law as the basis of subject matter jurisdiction was misplaced.

In *Suwannee I* the obstacle to jurisdiction was mistakenly perceived as being the discretionary nature of the decision to remit the duties. The actual statutory language stated that if the owner or master of the vessel furnished "good and sufficient evidence" that the repairs were compelled by "stress or weather or other casualty"

[46] Act of Aug. 8, 1953, ch. 397, sec. 11(c), 67 Stat. 515 (current version at 10 U.S.C. 1466 (1971).

then the Secretary of the Treasury was "authorized" to remit or refund the duties.

This provision for the benefit of vessels forced to make emergency repairs outside the United States was not a grant of discretion to the Secretary of the Treasury.[47] In reality, the obstacle to jurisdiction had nothing to do with discretion. It was the immunity of the Secretary of the Treasury's decision from protest under the statutes which had previously insulated the remission issue from determination by the court. *Waterman Steamship Corp.* v. *United States*, 30 CCPA 119, 125, C.A.D. 223 (1942). That immunity came about from a holding that the collectors of customs did not have the power to review issues "the final determination of which was conferred by the Congress exclusively upon the Secretary of the Treasury." *Waterman Steamship Corp.* v. *United States, supra*, page 125. Since the Secretary of the Treasury's decision could not be examined in an administrative protest review it followed that it could not be within the subject matter jurisdiction of a court limited to subject matters which could be protested. This reasoning was similar to the outmoded analysis contained in the directed assessment cases such as *Mill & Gibbs, supra*, and, in fact, *Mill & Gibbs* was one of the cases on which *Waterman* relied.

In *Suwannee I* the supposed obstacle of discretion was overcome by the resort to principles of judicial review of agency action in general and discretionary action in particular. The result was an apparent expansion of jurisdiction but at the expense of a complete scope of review and at the even greater cost of fostering a misconception that the court functioned in a framework of conventional administrative law.

In reality, the source of this court's subject matter jurisdiction in the case of duty assessments is not a general supervisory role which it plays in Customs matters under general principles of judicial review of administrative action. The subject matter originates from a fixed range of acts and subjects named in 19 U.S.C. 1514. Since the artificial distinction between acts of the Secretary of the Treasury and acts of his subordinates no longer exists in matters of duty imposition, the obstacle perceived in the *Waterman* case no longer exists.

The remission of ship repair duties is a matter whose finality is made subject to a process of administrative review by 19 U.S.C. 1514.

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[47] The proper approach to statutory provisions such as this, was stated by the Supreme Court in *Supervisors Rock Island Co.* v. *United States ex rel* State Bank, 71 U.S. 435, 446, 447 (1867).

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

It would be subject to complete examination in the subsequent trial of an action brought in this court to contest the failure to provide relief in that administrative process. If the refusal to remit duties was not protestable under section 1514 then no extraneous considerations such as the Administrative Procedure Act, or general rules of judicial review, could mold it into a form that could be protested. The court would simply not have subject matter jurisdiction.

Section 1514 is the filter through which a dispute challenging an assessment of duty must pass. This filter does not expand or contract in accordance with general principles of administrative law. It simply defines the "subject matter" jurisdiction of the court. Thus, under this analysis the matter of remission would fall within the jurisdiction of the court as the decision of the appropriate Customs officer as to the amount of duties chargeable or as an order or finding entering into the decision of the appropriate Customs officer.

Once through the filter of section 1514, there are no limitations on the depth with which a particular issue may be explored so the standard of decision to be applied to the issue of remission, if it reached the court, would be whether or not the law and the facts required the remission.

At that stage the "discretion" of the Secretary of the Treasury which concerned the court in *Suwannee I* would be no greater a bar to the scrutiny of the court than the "discretion" of the appropriate Customs official in choosing a classification or a valuation. Whatever implications might flow from the exercise of administrative authority are superseded by the specific subjection of the issues ultimately raised to determination in an independent court action.

In sum, the *Suwannee* cases asserted subject matter jurisdiction on a broad premise of administrative law which carried with it a narrow scope of review. Jurisdiction in this court must be premised on its own particular and explicit statutory authority. However, once a matter falls within the statutory authority it is tried in an entirely unrestricted manner. It logically follows that when the issue of the existence of a bounty or grant arises in an action challenging the imposition of countervailing duty all related questions of fact and law are subject to judicial scrutiny.

VI. The Judicial Nature of the Issue

Defendant also attempts to characterize a determination of the existence of a bounty or grant as an issue involving the exercise of judgment in the area of foreign trade policy. Defendant quotes the remark in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), cert. den. 404 U.S. 1005 (1971) that such a determination "necessarily involves judgment in the political, legislative or policy spheres." However, that remark was

made in support of a conclusion that there was no judicial "review" of determinations by the Secretary of the Treasury that "no" bounty or grant was being bestowed. The above conclusion prompted Congress to provide an action to contest that "negative" determination. See, 28 U.S.C. 2632(a)(3).[48] See also, Senate Finance Committee report (S. Rept. No. 92–1221, 92d Cong., 2d sess. 8 (1972). In so doing, Congress implicitly expressed the view that the "final" determination of the existence or nonexistence of a bounty or grant was wholly a judicial matter.

This court rejects any suggestion that the final judgments required in such a matter are other than judicial or that some sort of judicial abstention is appropriate. The proposition is insupportable and inconsistent with the countervailing duty statute, which expresses a fixed legislative standard for the assessment of the additional duties. For this court, the judicial function in the determination of whether a bounty or grant has been bestowed is the same as that required in the determination of any other statutory condition or term, such as "export value" or "chief use."

If there are fine points of economics involved in the ascertainment of the facts of a particular financial arrangement, then the matter is tried in the same manner as cases involving fine points of any area of specialized knowledge. The parties to the dispute before the court may support their contentions with appropriate evidence including expert opinion and authority.

This court's "expertise" in questions of classification or valuation (fields in which defendant apparently has no qualms as to the completeness of the court's scrutiny) is not derived from specialized knowledge of particular subjects such as engineering or chemistry or medicine. Its expertise is in the interpretation and application of the statutory and legal principles of Customs law. This is precisely what is involved in the question of the existence of a bounty or grant, no more and no less. Moreover, since the determination of the existence of a bounty or grant may very well involve the interpretation of foreign law, this would be a matter particularly within the competence of courts as well.

Judicial decisions interpreting and applying legislative language may have implications in many other spheres. This is a normal consequence of judicial decisions in any matter. However, the consequences of a court decision should not be confused with the judicial method of reaching a

[48] Act of Jan. 3, 1975, Public Law 93-618, title III, ch. 2, sec. 321(f)(3), 88 Stat. 2048.
The nature of the civil action to contest the determination by the Secretary of the Treasury that a bounty or grant is "not" being bestowed, must be discussed, lest by its closer superficial resemblance to a direct review of an administrative proceeding, its trial be mistakenly considered narrower than the trial of this civil action under sec. 2632(a). It suffices to point out that this was also made a "civil action" to "contest" and the legislative history makes it clear that it was intended as a replica of the action already provided for the benefit of the importer.

decision. The determination of the issue of existence of a bounty or grant within the meaning of the statute has always been reached by accepted and traditional judicial methods. For the court to utilize standards of judgment from any sphere other than those normally applied in judicial proceedings, would be unnecessary and improper.

Defendants additional argument that the administrative investigation is rendered useless if this court can try all issues of fact is ingenuous. It is obvious that administrative finality and efficiency must yield to more basic considerations of legality and conformity to principles established by Congress.

VII. Summary

Defendant's insistence on a restricted scope of trial in this countervailing duty action is without support. An unrestricted trial of all issues of fact and law is mandated by the plain legislative intent of the relevant statutes and is supported by the relevant case law. In addition, an unrestricted trial is the only proceeding consistent with the recent as well as remote history of the action, and is the only guarantee of the protection of constitutional rights in the area of tariff disputes.

The existence of a distinct and exclusive statutory action provided for by Congress precludes the application of general principles of judicial review of administrative actions. The action is brought to obtain the relief denied on the administrative level and requires the determination of all relevant issues in the court proceeding.

Restrictions expressed with regard to the court's power to try other issues have been found to be of questionable validity in light of the controlling considerations governing actions in this court and, in any event, are without application to the action involved herein.

The distortion of the motion for summary judgment, brought about by the intensive emphasis on the asserted restrictions on the court's power to try all the issues, requires that it be denied.

VIII. The Further Conduct of This Action

The implications of this opinion for the further conduct of this action are as follows:

The parties may utilize all relevant evidence regarding the issue of the existence of a bounty or grant without regard to whether or not the evidence was part of the administrative investigation.

The absence or presence of due process of law at the administrative level has no bearing on this action since the court is not judging the investigative proceeding or the resulting order but is itself trying the issue of the existence of a bounty or grant in an independent action. This court proceeding satisfies the requirements of due process of law in this area. On the administrative level, conformity to the administrative procedure set out in the statute is sufficient to satisfy the requirements of the law.

The claim by plaintiff that the assessment of duty was improperly influenced remains relevant since proof of such improper influence would be proof that the assessment was predicated on, or tainted by, considerations not named in the statute or permitted by law. This would be relevant to judging the correctness of the assessment of countervailing duty which is, of course, the principal issue in the case.

For the reasons expressed herein, defendant's motion for summary judgment is denied.

(C.R.D. 79-7)

EDGE IMPORT CORP. *v.* UNITED STATES

On Defendant's Motion to Strike
and
Plaintiff's Cross-Motion to Reopen Trial

Court No. 75-8-02155

Port of New York

[Motion to strike denied; cross-motion to reopen trial denied.]

(Dated March 26, 1979)

Greenwald, Kovner & Goldsmith (*Frank J. Hariton* and *Leo Goldsmith, Jr.*, of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Susan Handler-Menahem*, trial attorney), for the defendant.

MEMORANDUM OPINION TO ACCOMPANY ORDER

LANDIS, Judge: In this case plaintiff in its complaint has claimed certain imported merchandise, to wit: knives, should be classified under certain items of TSUS instead of under TSUS item 650.21, as classified by Customs.

Plaintiff has filed brief to which defendant, pursuant to Rules 1.1 and 11.3(g),* has filed motion to strike out portions thereof which allegedly make reference to factual matters not before the court and

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* RULE 1.1 * * *

* * * * * * *

(b) *Scope and Construction*: These rules govern all proceedings in the U.S. Customs Court and shall be so construed as to promote the just, speedy, and inexpensive determination of every action. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except as provided for in rule 14.9(b). Where, in any proceeding or in any instance, there is no applicable rule of procedure, the judge or judges, before whom the action is pending, may prescribe the same.

* * * * * * *

RULE 11.3 BRIEFS

* * * * * * *

(g) *General*: Briefs must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this rule may be disregarded by the court.

* * * * * * *

cites, *inter alia*, *Application of Harrington*, 55 CCPA 1459 (Patents), 392 F. 2d 653 (1968), and *Dreyfus* v. *Lilienfeld*, 18 CCPA 1526 (Patents), 49 F. 2d 1055 (1931).

Plaintiff has filed response to defendant's motion opposing the same, and in the alternative moves the court to set aside the submission and reopen the trial. Defendant has filed opposition and response objecting to plaintiff's previous motion to vacate submission of this case and reopen the trial.

As motions to strike portions of a brief are only sparingly granted by the court (*Application of Harrington* and *Dreyfus* v. *Lilienfeld*, *supra*), and as the court will not be prejudiced or misled by any such matter and in order that the case may proceed to final disposition without unnecessary delay, the motion of defendant to strike and the motion of plaintiff to reopen the trial are each, respectively, denied.

Defendant is ordered to file its answer brief on the merits of this case within 30 days from the date hereof.

(C.R.D. 79–8)

ARMSTRONG BROS. TOOL CO. ET AL. *v.* UNITED STATES (GREAT NECK SAW MANUFACTURING, INC., PARTY-IN-INTEREST)

Memorandum Opinion and Order

Court No. 77–8–02004

[Plaintiffs' motion to compel discovery denied.]

(Dated March 27, 1979)

Frederick L. Ikenson for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *Sidney N. Weiss*, trial attorneys), for the defendant.

NEWMAN, Judge: This is an American manufacturers' action brought pursuant to 28 U.S.C. 1582(b), 28 U.S.C. 2632(a) and 19 U.S.C. 1516(c) involving the Antidumping Act of 1921, as amended (19 U.S.C. 160, *et seq.*). For the background of this litigation, reference is made to my prior opinion in *Armstrong Bros. Tool Co. et al.* v. *United States, etc.*, 80 Cust. Ct. 160, C.D. 4751, 453 F. Supp. 889, *modified on rehearing*, 81 Cust. Ct. 162, C.R.D. 78–14 (1978).

Plaintiffs have filed a motion to compel discovery under rule 6.5 seeking access to six documents in the files of the Treasury Department. Defendant has interposed a claim of executive privilege respecting certain expurgated portions of the six documents supported by

an affidavit executed by the Secretary of the Treasury (Secretary). The Secretary's affidavit asserts privilege respecting each of the six documents "to the extent they contain advice, recommendations, or statements of views and opinions by officials and staff members of the Treasury Department". However, the Secretary's affidavit did not specifically aver that the *deleted portions* comprise such "advice, recommendations, or statements of views and opinions * * *".

On January 4, 1979, an order was entered in this case directing the Secretary to prepare and transmit under seal to this court certified copies of the six documents in complete and unexpurgated form for an *in camera* inspection. *Armstrong Bros. Tool Co. et al.* v. *United States, etc.*, 82 Cust. Ct. 296, C.R.D. 79-2 (1979). The Secretary has complied with that order, and I have made an *in camera* inspection of the disputed documents. Following the principles enunciated in my prior opinion herein, C.R.D. 79-2, and in *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 81 Cust. Ct. 168, C.R.D. 78-18. 462 F. Supp. 966 (1978) and cases there cited, I find that the deleted portions of each of the six documents comprise "advice, recommendations, or statements of views or opinions, of various officials and staff members of (the Treasury) Department," as stated in the Secretary's affidavit. Hence, defendant's claim of privilege is sustained.

Accordingly, it is hereby ORDERED that plaintiffs' motion for an order compelling discovery is denied.

(C.R.D. 79-9)

AIRCO, INC. *v.* UNITED STATES

On Plaintiff's Motion for Deposition and Production of Documents and Cross-Motion for a Protective Order

SCOPE OF TRIAL IN COUNTERVAILING DUTY ACTIONS

An action in the Customs Court is tried *de novo* and the court's jurisdiction is not limited to reviewing an administrative record.

Court No. 76-3-00643

[Plaintiff's motion granted; defendant's cross-motion denied.]

(Dated April 16, 1979)

Frederick L. Ikenson for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendant.

OPINION TO ACCOMPANY ORDER

RICHARDSON, Judge: This is an action to review a negative countervailing duty determination of the Secretary of the Treasury, authorized under 19 U.S.C.A., section 1516(d), in which plaintiff moves to depose defendant through its agents, Lynn J. Barden, an attorney-adviser in the Office of the General Counsel, U.S. Department of the Treasury, and R. Theodore Hume, an Assistant Chief Counsel, U.S. Customs Service (formerly an attorney-adviser in the Office of the General Counsel, U.S. Department of the Treasury), and to depose one Peter O. Suchman, formerly Deputy Assistant Secretary of the Treasury, and further, to require the deponents to bring with them all documents and tangible things in their possession or under their control, not previously furnished by defendant to plaintiff's counsel in this action, relating to the countervailing duty case of *Ferrochrome from South Africa*.

In support of the motion plaintiff avers that Mr. Suchman was not only the senior Treasury Department official directly responsible for overseeing the administration of 19 U.S.C.A., section 1303—the countervailing duty statute, but in his capacity as Acting Assistant Secretary of the Treasury, issued the final negative countervailing duty determination the subject of this litigation, that Mr. Barden not only participated in an investigatory, advisory, and/or analytical capacity in the subject countervailing duty investigation, but was identified by defendant in plaintiff's interrogatories as one of the persons consulted (together with Mr. Suchman) for the purpose of making responses to the interrogatories, and that Mr. Hume was identified by defendant in said interrogatories as the person responsible for collecting, compiling, and furnishing to the Justice Department, the information which is the basis for defendant's answers to plaintiff's interrogatories, and who also participated, in consultation with Mr Barden, in the preparation of the answers to the interrogatories. Plaintiff asserts that it seeks to examine deponents principally with respect to the Treasury Department's reasons for issuing a negative determination in the countervailing duty case, certain memoranda written by deponents, and certain answers given in response to plaintiff's interrogatories, especially Nos. 1, 4, and 11, which, in the judgment of plaintiff's counsel, require clarification and amplification, all with a view toward discovering relevant evidence.

Defendant opposes the motion and, in the alternative, cross-moves for a protective order limiting the scope of the depositions. In support of its opposition and cross-motion, defendant asserts that the scope of judicial review in this action is limited to the administrative record, that the depositions sought constitute improper attempts to probe the mental processes of the administrative decision-maker and his attor-

ney-advisers, that Messrs. Barden and Hume are "employees" of the United States whom plaintiff improperly seeks to examine as "agents," and that should the depositions be allowed, plaintiff should not be permitted to: (1) Inquire into any matters which are not part of the administrative record; (2) inquire into advisory opinions, recommendations or reasons therefor; (3) inquire into deponents' mental or thought processes; (4) inquire of Messrs. Barden and Hume into matters concerning which they served as attorneys to defendant or which are otherwise outside the scope of their employment as "employees" of defendant; and (5) inquire into any matters other than deponents' personal knowledge of the circumstances of the making and maintenance of the administrative record.

In response to defendant's opposition and cross-motion, plaintiff maintains that the scope of judicial review of the Secretary's negative countervailing duty order is trial *de novo*, that even if the scope of judicial review herein is limited, the mental processes of the administrator may be probed if he has left no other record of the reasons for his decision—in order that the rationale behind the determination under review may be ascertained, that defendant erroneously assumes that the lawyer-client privilege attaches to all communications between lawyer and client, and that Messrs. Barden and Hume did act as agents for defendant when they functioned as such in responding to interrogatories directed to defendant.

The court is inclined to agree with plaintiff. As defendant's counsel points out in her memorandum (p. 5), the character of proceedings conducted by the Secretary of the Treasury under the countervailing duty statute is "investigatory." However, proceedings in a judicial tribunal such as the Customs Court are "adversarial" in nature.

The defendant asserts that it has "consistently and persistently vigorously espoused its position"* limiting the scope of judicial review of the Secretary of Treasury's determination as to the payment or bestowal of a bounty or grant "dehors" the administrative record in the various countervailing duty actions instituted in the Customs Court. It appears to this member of the court that the espousal is of recent vintage, following the Trade Act of 1974, which for the first time gave the Customs Court jurisdiction to review negative determinations of petitions for the imposition of countervailing duties. In fact, even when the Board of General Appraisers, the predecessor of the Customs Court, was structured within the Department of the Treasury, the appellate courts held that the board "is a judicial tribunal, clothed with judicial powers to determine the classification of imported goods and the duty which should be imposed thereon," *United States* v. *Kurtz, Stubbeck & Co.*, 5 Ct. Cust. Appls. 144, 146,

*See defendant's memorandum, p. 2, on motion to stay proceedings, denied Apr. 5, 1979.

T.D. 34192 (1914); that "[i]ts powers and functions are judicial, its process, forms, and practice are judicial, and its decisions and judgments have the force and conclusiveness of those of other courts," *United States* v. *Macy & Co., Inc.*, 13 Ct. Cust. Appls. 245, 249, T.D. 41199 (1925); and, significantly, that although affidavits of antiquity authorized under regulations issued by the Secretary of the Treasury were final in the first instance for the purposes of entry, upon protest before the board "the question of antiquity comes on for hearing *de novo*, like other cases," *United States* v. *Thomas*, 3 Ct. Cust. Appls. 142, 145, T.D. 32385 (1912).

And, consistent with these holdings, the Court of Customs and Patent Appeals has held with respect to cases arising in the Customs Court that "the Secretary of the Treasury is not authorized to prescribe the character of proof required in proving issues before the trial court," *United States* v. *C. J. Holt & Co., Inc.*, 17 CCPA 385, 387, T.D. 43822 (1930); and "[t]he Customs Court is a court of justice, and the same rules of evidence apply there as in courts of general jurisdiction," *W. T. Grant Company* v. *United States*, 38 CCPA 57, 61, C.A.D. 440 (1950).

Thus, it is clear that when operating under the same "mandatory" statute such as the countervailing duty statute, the "adversarial" character of the judicial proceeding under the statute emerges in sharp contrast to the "inquisitorial" character of the prior administrative proceeding under the statute and under which, in the words of defendant's counsel (memorandum, p. 5) "the 'interested parties' who do appear may present facts which the Secretary may find of interest and assistance to him, but have no right of cross-examination." Before the Customs Court in a section 1516(d) civil action, the United States represents but one of two parties in an "adversarial" proceeding. And, although the administrative record may be the measure of the Government's input into that "adversarial" proceeding, it can hardly have been intended by the Congress that such a record also be the measure of input into such proceeding on the part of the Government's adversary—consistent with the expressed congressional intent in this new legislation, the Trade Act of 1974, to place the American manufacturer on an equal footing with his counterpart, the American importer, insofar as judicial remedies are concerned, and of whose judicial remedies the Congress was undoubtedly aware. See *Energetic Worsted Corp.* v. *United States*, 53 CCPA 36, 42, C.A.D. 874 (1966), *reversing Energetic Worsted Corp.* v. *United States*, 51 Cust. Ct. 55, C.D. 2413 (1963), where, at the instance of an American importer and upon a "plenary trial record," the Court of Customs and Patent

Appeals rejected a bounty-finding determination of the Secretary of the Treasury [whose determination was supported by a majority of judges on a Customs Court panel] upon a finding that the Secretary's determination was not supported by "substantial evidence."

Certainly, it can scarcely have been the intention of Congress to radicalize the traditional nature of judicial proceedings in the Customs Court solely on the occasion of expanding the remedies available to a segment of the American public in that court, without expression of a purpose to do so. And nothing but the most cogent expression of views in this direction, totally lacking in the legislative history of section 1516(d), would warrant such a conclusion.

Assuming, without admitting, as defendant contends, judicial review of the negative countervailing duty determination rendered by the Secretary of the Treasury, reported at 41 F.R. 1298 (1976), is limited to the administrative record, still, in order for judical review in this action to be meaningful, the court needs to know the reasons which prompted the Secretary to act in the manner he did. After reading the Secretary's final decision in the case the court is convinced that the terseness of its conclusory language leaves something more to be desired relative to the underlying basis for the determination.

Discovery is a useful tool with which to amplify an otherwise meager administrative record. Indeed, its employment by plaintiff prior to the instant motions has resulted in the identification of individuals whose activities in government service place them, in the court's judgment, in such high levels of policy-making endeavor in relation to the determination under review as to make them privy to relevant factual material, if it exists, and characterize them as "agents" (Messrs. Barden and Hume), and, therefore, amenable to additional discovery procedures in such capacity.

The proposed discovery does not, in the court's view, exceed permissible limits or warrant protective measures at this point. Defendant's fears in this regard are at best anticipatory and premature, and certainly not grounded in any factual basis. Even factual material contained in deliberative memoranda is discoverable if susceptible to severance from its context. See *A. O. Smith* v. *Federal Trade Commission*, 403 F. Supp. 1000, 1015 (1975). And should any improper question be propounded during the examinations, defendant's remedies are ample and accessible at such a time.

For the reasons stated, plaintiff's motion is granted and defendant's cross-motion is denied.

(C.R.D. 79–10)

MITSUBISHI INTERNATIONAL CORPORATION *v.* UNITED STATES

Memorandum Opinion in Explanation of the Dismissal of Court No 77–7–01146 [81 Cust. Ct. 86, C.D. 4771]

(Dated April 18, 1979)

Bogle & Gates (*David M. Salentine* and *Thomas J. McKey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss* and *Madeline B. Cohen*, trial attorneys), for the defendant.

WATSON, Judge: This is written to explain the dismissal of this action for lack of jurisdiction in *Mitsubishi International Corporation* v. *United States*, 81 Cust. Ct. 86, C.D. 4771 (1978).

This action originated in a protest made against a notification by the district director at Anchorage, Alaska, that he was mitigating a previous demand for penalties to a lower amount. Defendant moved to dismiss the action on the ground that decisions relating to the imposition of a penalty are not within the subject matter jurisdiction of this court. The court denied the motion, holding that a decision to impose a penalty was a decision as to an exaction within the meaning of 19 U.S.C. 1514(a) (3), was protestable, and ultimately could be challenged in the Customs Court. *Mitsubishi International Corporation* v. *United States*, 81 Cust. Ct. 145, C.R.D. 78–9, 454 F. Supp. 458 (1978).

Thereafter, upon defendant's motion for rehearing and reconsideration, the court dismissed the action. This was done without an opinion, the lack of which the court now views as a regrettable source of uncertainty as to the grounds for dismissal.

In this case the court considered the decision of the district director to exact a lower penalty as the final decision of the appropriate customs officer as to an exaction within the jurisdiction of the Secretary of the Treasury as described in 19 U.S.C. 1514(a). The final decision in such a matter is the decision which the importer does not seek to modify, or cannot modify, by means of petition procedures allowed under regulations issued by the Secretary of the Treasury. If, in fact, the decision follows a petition procedure instituted by the importer it is subject to protest, not for error in the mitigation or remission process, but rather for error in the exaction of a penalty in terms of 19 U.S.C. 1592.

Here, the protest was made following a decision to lower the penalty. Originally, the court thought that the district director's refusal to treat the protest as a protest and his characterization of it, in his letter of January 17, 1977, as a "supplemental petition" for review* constituted a rejection or denial of the protest. But upon reconsidera-

*Pursuant to 19 CFR 171.33.

tion it became clear that, semantics aside, the plaintiff's objections did subsequently receive administrative review. Accordingly, although the district director could not transform the importer's protest into a petition by administrative fiat he did not deny the protest by electing to consider its contents under another name. It follows that the protest was ultimately denied on June 22, 1978, when the "supplemental petition" was denied.

Since plaintiff brought this action prior to the actual denial of its administrative protest, the action was prematurely commenced in this court. See, 28 U.S.C. 1582(c) and 28 U.S.C. 2631(a). For the above reasons the action was dismissed.

(C.R.D. 79-11)

SCM CORPORATION, PLAINTIFF, v. UNITED STATES (BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST), DEFENDANT.	Court No. 77-4-00553

Motion for a protective order upon a claim of privilege granted

EXECUTIVE PRIVILEGE—DEFINED

The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations, and deliberations in the formulation of governmental policies and decisions.

EXECUTIVE PRIVILEGE—PURPOSE

The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decision-making. See *United States* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974).

EXECUTIVE PRIVILEGE—SCOPE

Except in cases of military or State secrets, executive privilege is not absolute, and the courts must determine whether the facts justify sustaining the claim of privilege. See *United States* v. *Reynolds*, 345 U.S. 1, 11, 73 S. Ct. 528 (1953). The courts have permitted disclosure of purely factual communications which would not compromise military or State secrets. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827 (1973). In weighing the conflicting interests to determine whether the documents should be protected from disclosure, a specific need must be demonstrated for the materials sought. Upon this basis, the importance of the materials to the lawsuit is weighed against the governmental policy to protect the confidentiality of executive communications. *United States* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974).

EXECUTIVE PRIVILEGE—PROCEDURE

To be properly invoked, the claim of executive privilege must comply with established criteria; the privilege must be formally claimed; it must be asserted by the head of the agency who personally considered the matter; the materials must be reviewed; and an appropriate affidavit must be submitted in support of the claim. See *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party in Interest*), 462 F. Supp. 966, 81 Cust. Ct. 168 (1978).

EXECUTIVE PRIVILEGE—WAIVER

A valid objection to the production of the documents made upon a discovery request should not foreclose additional objections in subsequent proceedings.

(Dated June 11, 1979)

Frederick L. Ikenson for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Branch Director, Federal Programs Branch; *Sheila N. Ziff*, trial attorney), for the defendant.

Tanaka, Walders & Ritger (*H. William Tanaka, Lawrence R. Walders* and *Wesley K. Caine* of counsel) for the party-in-interest.

RE, Chief Judge: This is an American manufacturer's action brought by SCM Corp. [SCM], a domestic typewriter manufacturer, under the provisions of 19 U.S.C. 1516(c). Plaintiff, SCM, seeks to review the failure of the Secretary of the Treasury to assess dumping duties on certain Japanese typewriters under the terms of the Antidumping Act of 1921, as amended.

For dumping duties to be assessed, it is necessary that the Secretary of the Treasury determine that a class or kind of imported merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value. In addition, the International Trade Commission must determine that an industry in this country is being, or is likely to be, injured, or is prevented from being established by reason of the importation of such merchandise at less than fair value. It is only when both of these determinations are made in the affirmative, i.e., less than fair value and injury, that dumping duties may be assessed. Thus, if the Secretary finds no sales at less than fair value, or if the International Trade Commission makes a negative injury determination, no dumping finding can be published and no dumping duties can be assessed. 19 U.S.C. 160 et seq. (Antidumping Act).

The history and underlying issues of this litigation are discussed in *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 450 F. Supp. 1178, 80 Cust. Ct. 226 (1978), in which this court decided that it had jurisdiction to review the negative injury determination of the International Trade Commission.

During the course of the litigation, plaintiff, by interrogatories,

sought from the defendant, among other things, all documents and things in the files of the International Trade Commission and each Commissioner in investigation No. AA1921-145. In response, defendant categorized and identified all of the documents and things that it claimed were in the files of the Commission or Commissioners at the time of the negative injury determination.

Defendant did not produce the documents requested, and plaintiff sought an order compelling discovery. Defendant filed a cross-motion for a protective order, and moved to be relieved from responding to plaintiff's interrogatories and motion to produce.

The court entered an order requiring that the Secretary of the International Trade Commission prepare and transmit to the Clerk of the U.S. Customs Court, the following:

(1) A certified copy of the transcript of proceedings, and all exhibits introduced before the Commission in its investigation numbered AA1921-145;

(2) Certified copies of all written submissions, questionnaires, reports, and other documents which relate to investigation AA1921-145;

(3) All other things in the files of the Commission relating to that investigation.

The order further provided that the denial of defendant's cross-motion for a protective order was without prejudice, and was subject to renewal for the documents or things that were received by the Commission on a confidential basis, or that were otherwise privileged. *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 81 Cust. Ct. 159, C.R.D. 78-13 (1978).

In compliance with that order, copies of all documents, confidential and nonconfidential, were transmitted to the court. Based upon a claim of executive privilege asserted by Hon. Joseph O. Parker, chairman of the International Trade Commission, the defendant now moves for a protective order as to nine documents. A formal affidavit executed by Chairman Parker was submitted and attached to defendant's brief.

When defendant, in response to plaintiff's discovery request, identified every document and thing in the files, it identified only one of the nine documents now claimed to be privileged, i.e., item No. 44, the "pros and cons" statement. Defendant contends that it has validly asserted privilege not only as to document No. 44, but also as to the other eight documents not previously identified.

The nine disputed documents listed by the defendant are described as follows:

No. 44—An undated 4-page "pros and cons" statement prepared by staff for the use of the Commissioners in arriving at the

Commission's determination with regard to Portable Electric Typewriters from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry;

No. 56—Twelve-page, handwritten draft of Document 44;

No. 58—An undated 2-page draft opinion entitled "Statement of Reasons for Determination of Commissioner Minchew to Abstain" prepared by staff for the exclusive consideration of, and use by Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;

No. 59—An undated 1-page draft opinion entitled "Statement of Reasons for Abstension (sic) of Vice Chairman Minchew" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;

No. 62—Four-page draft opinion, dated June 16, 1975, entitled "Statement of Reasons for Negative Determination of Chairman Leonard, Commissioner Bedell," prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons. The document contains staff advice, conclusions, deliberations, opinions, and recommendations;

No. 63—Three pages of handwritten notes used as a basis for the development of Document 44. Like Documents 44 and 56, this contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry;

No. 68—An undated, four-page, second draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Leonard and Commissioners Bedell and Parker" prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons, with handwritten modification made by, or at the direction, of individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations, as well as tangible evidence of Commissioners' thought processes (in the case of handwritten modifications);

No. 77—A five-page draft opinion, dated June 17, 1975, entitled "Statement of Reasons for the Affirmative Determination of Commissioner Ablondi" prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations;

No. 78—Five-page untitled draft opinion, dated June 16, 1975, that supports an affirmative determination of injury in Portable Electric Typewriters from Japan. This document

was prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. This document contains advice, conclusions, deliberations, opinions, and recommendations.

Plaintiff's opposition to the defendant's motion for a protective order is based upon its contention that the claim of executive privilege has been waived by defendant's conduct, and that, in any event, it has not been properly invoked. Plaintiff also maintains that the privilege against interagency advisory opinions is not absolute but qualified.

Plaintiff states that, in response to its discovery request, defendant identified only one of the nine documents now claimed to be privileged, item No. 44, the "pros and cons" statement. At that time, this document was not produced by the defendant on the ground that it was outside the scope of judicial review in these proceedings. Consequently, it is plaintiff's contention that, since the defendant based its refusal to produce item No. 44 solely upon the scope of judicial review, the defendant has waived its claim of privilege.

The plaintiff also contends that, when asked to identify and produce, the defendant's response did not identify the eight additional documents produced after the court entered its order requiring production of all documents and things in the files of the Commission and Commissioners. Plaintiff argues that the defendant has offered no explanation for its failure to produce except that the eight documents were recently located. Also as to these documents, therefore, plaintiff contends that the defendant's conduct is tantamount to a waiver of its claim of executive privilege.

Plaintiff submits an additional reason to deny the defendant's motion for a protective order. It asserts that the claim of executive privilege must be made by the "head" of the department or agency who must personally review the matter to determine whether the privilege should be invoked, and that the chairman of the International Trade Commission is not the appropriate official to invoke the privilege for that agency.

Finally, plaintiff urges that the privilege which attaches to interagency advisory communications does not apply "to purely factual communications within or between agencies, the disclosure of which would not compromise military or state secrets * * *"; further, that if no military or state secrets will be disclosed, even privileged materials should be disclosed "if the need for disclosure outweighs the harm that could result therefrom * * *."

The defendant, in support of its claim of privilege, indicates that it is well established that the government can assert an evidentiary privilege as to documents which contain intragovernmental advice,

opinions and recommendations. The defendant also contends that the failure to pursue a timely valid claim of privilege should not be considered a waiver. Although the defendant states that it erred not to have specifically claimed privilege as to item No. 44, that fact should not prevent the court from granting its motion.

If its claim of executive privilege is not sustained, as alternative relief, the defendant requests a certification by the court that the denial of its motion presents a controlling question of law which justifies an immediate appeal to the Court of Customs and Patent Appeals under 28 U.S.C. 1541(b).

The court must initially examine plaintiff's contention that the defendant has waived the privilege. In addition to denying any waiver, the defendant urges that the public interest in protecting government privileged materials far outweighs the deficiencies in asserting the claim.

As to item No. 44, it is sufficient to note that the defendant initially refused to produce the document on the ground that it was outside the scope of discovery. A valid objection that has been asserted should not foreclose additional grounds for objection in subsequent proceedings. Since executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred. Surely, a waiver cannot be implied on the facts before the court.

As for the eight documents not identified upon the discovery request, and now claimed to be privileged, the opportunity to raise the claim of executive privilege should be permitted if it is required by the public interest. In the motion to compel discovery, the defendant has invoked the claim of executive privilege as to all documents. The cases teach that this was a proper method for the invocation of the privilege. See *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing, Inc., Party-in-Interest*), 463 F. Supp. 1316, 82 Cust. Ct. 344 (1979).

On the question whether the claim has been properly invoked by Chairman Parker, the court notes that it has been held that the Chairman of the International Trade Commission holds a position of high authority, and is authorized to examine documents with the expertise to exercise a proper claim of privilege. *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 462 F. Supp. 966, 81 Cust. Ct. 168 (1978). Quoting from *Smith* v. *Federal Trade Commission*, 403 F. Supp. 1000, 1016 (D. Del. 1975), which examined the role of the Chairman of the Federal Trade Commission, Judge Newman, in *Sprague* stated:

> * * * Chairman Parker is * * * "someone in a position of high authority [who] could examine the materials involved from

a vantage point involving both expertise and an overview-type perspective." Plainly, then, the rationale adopted by the Court in *Smith* concerning the Chairman of the FTC is fully applicable here to the Chairman of the ITC. Within the doctrine of *United States* v. *Reynolds*, 345 U.S. 1, 7–8 (1953), the Chairman of the ITC is clearly the "head" of the Commission for purposes of asserting a claim of executive privilege, and such claim was properly made by him in this case on behalf of the Commission. See also *Kerr* v. *United States District Court*, 511 F. 2d 192, 198 (9th Cir. 1975) (by implication), aff'd, 426 U.S. 394 (1976). 462 F. Supp. at 969.

In the action presently before the court, there has been full compliance with the established criteria: The privilege has been formally claimed; it has been asserted by the head of the agency having control over the matter, the Chairman of the International Trade Commission, who personally considered the matter; the materials have been reviewed; and an appropriate affidavit has been submitted in support of the claim of privilege. On the circumstances presented, plaintiff's contention that the claim has not been properly invoked is without merit.

Although it is said that discovery rules apply to the United States "just as fully as they apply to any other person," one of the privileges against discovery, unique to the United States as a sovereign, is that of "executive privilege." See Wright & Miller, "Federal Practice and Procedure: Civil," § 2019 (1970). The doctrine of executive privilege permits the executive branch to withhold disclosure of intragovernmental documents which contain advisory opinions, recommendations and deliberations in the formulation of governmental policies and decisions. *National Courier Association* v. *Board of Governors of the Federal Reserve System*, 516 F. 2d 1229, 1241–42 (D.C. Cir. 1975); *Smith* v. *Federal Trade Commission*, 403 F. Supp. 1000, 1014 et seq. (D. Del. 1975); and *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. 347, 350, C.R.D. 73–9 (1973).

The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decision-making. In the words of Mr. Chief Justice Burger, the privilege is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances * * * to the detriment of the decision-making process." *United States* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974). See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504 (1975).

Except in cases of military or state secrets, executive privilege is not absolute, and the courts must determine whether the facts justify sustaining the claim of privilege. See *United States* v. *Reynolds*, 345

U.S. 1, 11, 73 S. Ct. 528 (1953); Wright & Miller, "Federal Practice and Procedure: Civil" § 2019 (1970). For example, the courts have permitted the disclosure of purely factual communications which would not compromise military or state secrets. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 87–88, 93 S. Ct. 827 (1973). Indeed, in all cases the courts must weigh the need for the materials sought against the potential harm that would result from their disclosure. See *United States* v. *Nixon*, 418 U.S. 683, 711–12, 94 S. Ct. 3090 (1974); *Black* v. *Sheraton Corporation of America*, 371 F. Supp. 97, 100 (D.D.C. 1974); *Smith* v. *Federal Trade Commission*, 403 F. Supp. 1000, 1015, (D. Del. 1975).

In weighing the conflicting interests to determine whether the documents should be protected from disclosure, a specific need must be demonstrated for the materials sought. Upon this basis, the importance of the materials to the lawsuit is weighed against the governmental policy to protect the confidentiality of executive communications. *United States* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090 (1974). For example, in *Sun Oil Company* v. *United States*, 514 F. 2d 1020 (Ct. Cl. 1975), the petitioner alleged that its application for an offshore oil platform had been denied by the United States for improper political reasons. The court ordered an in camera inspection of Presidential documents so that it might weigh the conflicting interests between plaintiff's need for the evidence and the Government's requirement of secrecy.

On the other hand, in the *Sprague* case, which dealt with a document similar to item No. 44 in the present case, the court observed:

> The draft opinions and "pros and cons" statements sought by plaintiff (documents "a" through "g" in exhibit A) comprise essentially intra-agency advisory opinions and recommendations by the Commission's staff, and were an integral part of the Commission's deliberative process. Thus, these opinions and statements fit squarely within the concept of executive privilege as enunciated in the above-cited cases. In the process of making injury determinations and other decisions within the scope of its authority, it is undoubtedly in the public interest that the Commission and its staff must necessarily feel free to explore various alternatives on a confidential basis. [Footnotes omitted.] 462 F. Supp. at 973.

While documents which contain only factual material may be discovered, it has been observed that:

> Free discovery of opinions based on those facts might cause undue reticence by the investigating officer, and prevent fulfillment of the purposes of the investigation. * * * *Reliable Transfer Co.* v. *United States*, 53 F.R.D. 24, 25 (E.D.N.Y. 1971).

Although the legal principle is clear, because of the difficulty in some cases in distinguishing between fact and opinion, its application is not always free from doubt. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86, 93 S. Ct. 827 (1973). In this case, plaintiff has made no request for a severance of any facts from the deliberative or other contents of the documents in issue.

The privilege accorded intragovernmental memoranda reflects the public policy that preliminary discussions and deliberations require confidentiality for a candid consideration of alternative courses of conduct. *Grumman Aircraft Eng. Corp.* v. *Renegotiation Board*, 482 F. 2d 710, 718 (D.C. Cir. 1973). This aspect of the privilege is analogous to the fifth exemption in the *Freedom of Information Act* which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5). Indeed, the public interest in fostering candid discussion among governmental personnel may be deemed to take precedence over a litigant's interest in discovering matter essential to presenting a case. See *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958).

In the present case, plaintiff has not demonstrated a clear and persuasive need for the documents in question. In weighing the opposing interests, between the need to produce the documents and the public policy which prevents their disclosure, no compelling reasons have been offered by the plaintiff which would justify producing the "pros and cons" statement as well as the other documents. Plaintiff has not demonstrated what it expects to learn from the disputed materials, nor has it offered sufficient reasons to warrant the production of documents which admittedly contain deliberative matter. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. at 947–48.

Plaintiff urges that an in camera inspection by the court of the Commission's staff's "pros and cons" statement and draft opinions "may help focus on those facts or documents in the record thought [by the Commission's staff] to be most significant." To follow the suggestion would violate the policy which protects probing the mental processes of public officials who must evaluate the frank expression of opinion of those who must advise and set forth the advantages and disadvantages of a proposed decision. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 92, 93 S. Ct. 827 (1973); *Morgan* v. *United States*, 304 U.S. 1, 18, 58 S. Ct. 773 (1938). See also discussion in Schwartz, "Administrative Law" 385–92 (1976).

The materials sought, as described in the sworn affidavit and descriptive summary, contain recommendations of two opposite courses of action, viz., on the one hand, a recommendation for an affirmative

injury determination, and, on the other, a recommendation for a negative injury determination. Clearly, these documents, containing opinions, deliberations, advice, and recommendations, show an evaluation by those who must advise on the advantages and disadvantages of a proposed policy decision.

On the question of an in camera inspection, the following statement from the decision of this court in *Armstrong Bros. Tool Co. et al.* v. *United States* (*Great Neck Saw Manufacturing Inc., Party-in-Interest*), 463 F. Supp. 1316, 82 Cust. Ct. 344 (1979) is pertinent:

> In certain cases where courts have utilized the "in camera" procedure for determining claims of executive privilege, "it appeared, before the inspection was ordered, that the claimant was entitled to some amount of discovery," and it was necessary to separate the privileged and unprivileged materials. [Citations omitted.] 463 F. Supp. 1320.

Thus, where the circumstances demonstrate that factual materials are a part of advisory memoranda, and are severable, an in camera inspection may determine which materials should be disclosed. In this case, the Chairman of the International Trade Commission has submitted an affidavit, attached to a description of the materials, which specifically declares that the claimed documents consist of advisory opinions, conclusions, considerations, deliberations, advice, and recommendations prepared by members of the Commission's staff. The accuracy and veracity of the contents of the materials presented are not questioned. From the description of the materials, and the Chairman's affidavit, it does not appear that an in camera inspection is warranted. Hence, the claim of privilege is sustained.

In summary, the Chairman of the International Trade Commission, in claiming privilege and resisting disclosure, by his affidavit and the description of the materials, has demonstrated to the court that the documents in question are advisory, and contain no severable factual information. The documents in question, representing "pure deliberative processes of government," are protected against disclosure. *Weir* v. *United States*, 508 F. 2d 894 (2d Cir. 1974).

For the foregoing reasons, based upon all of the papers and proceedings had, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendant's motion for a protective order is granted, and that a claim of privilege has been found to have been correctly made for the documents described in the attached exhibit A, and, it is further

ORDERED, ADJUDGED, AND DECREED that the clerk of the court shall seal the documents listed in the attached exhibit A and keep them sealed pending any further order by the court.

In view of the foregoing, the defendant's request to file an immediate appeal pursuant to 28 U.S.C. 1541(b) is moot.

EXHIBIT A

LIST OF DOCUMENTS INVOLVED IN INVESTIGATION AA1921-145 WITH REGARD TO PORTABLE ELECTRIC TYPEWRITERS FROM JAPAN AS TO WHICH PRIVILEGE IS INVOKED

*Document:**	*Description*
44	An undated four-page "pros and cons" statement prepared by staff for the use of the Commissioners in arriving at the Commission's determination with regard to Portable Electric Typewriters from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.
56	Twelve-page, hand-written draft of Document 44.
58	An undated two-page draft opinion entitled "Statement of Reasons for Determination of Commissioner Minchew to Abstain" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.
59	An undated one-page draft opinion entitled "Statement of Reasons for Abstension (sic) of Vice Chairman Minchew" prepared by staff for the exclusive consideration of, and use by, Commissioner Minchew in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.
62	Four-page draft opinion, dated June 16, 1975, entitled "Statement of Reasons for Negative Determination of Chairman Leonard, Commissioner Bedell," prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons. The document contains staff

*These numbers correspond to those in the "List of Documents and Things in the Files of the U.S. International Trade Commission which Relate to ITC Investigation No. AA1921-145 (Portable Electric Typewriters from Japan)."

advice, conclusions, deliberations, opinions, and recommendations.

63..... Three pages of handwritten notes used as a basis for the development of Document 44. Like Documents 44 and 56, this contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.

68..... An undated, four-page, second draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Leonard and Commissioners Bedell and Parker" prepared by staff for the consideration of, and use by, the Commissioners in arriving at their statement of reasons, with hand-written modification made by, or at the direction, of individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations, as well as tangible evidence of Commissioners' thought processes (in the case of hand-written modifications).

77..... A five-page draft opinion, dated June 17, 1975, entitled "Statement of Reasons for the Affirmative Determination of Commissioner Ablondi" prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. The document contains advice, conclusions, deliberations, opinions, and recommendations.

78..... Five-page untitled draft opinion, dated June 16, 1975, that supports an affirmative determination of injury in portable electric typewriters from Japan. This document was prepared by staff for the exclusive consideration of, and use by, Commissioner Ablondi in arriving at his statement of reasons. This document contains advice, conclusions, deliberations, opinions, and recommendations.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/1	Ford, J. January 8, 1979	Norman G. Jensen, Inc.	75-2-00464, etc.	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Noyes (Pembina); Grand Portage and International Falls-Ranier (Duluth) Skidder tractors
P79/2	Boe, J. January 8, 1979	EM Laboratories, Inc.	77-7-01319	Item 547.55 21%	Item 711.88 11%	E. M. Laboratories, Inc. v. U.S. (C.D. 4744)	New York Thin layer chromatography plates
P79/3	Boe, J. January 8, 1979	EM Laboratories, Inc.	78-3-00407	Item 547.55 21%	Item 711.88 11%	E. M. Laboratories, Inc. v. U.S. (C.D. 4744)	New York Thin layer chromatography plates
P79/4	Maletz, J. January 10, 1979	United China and Glass Co.	76-8-01906	Item 737.40 35%	Item 256.75 8.5%	Wilson's Customs Clearance, Inc. v. U.S. (C.D. 3061)	Philadelphia Bobbing head dogs
P79/5	Ford, J. January 11, 1979	Norman G. Jensen, Inc.	74-9-02442	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Grand Portage and International Falls-Ranier (Duluth); Noyes (Pembina) Skidder tractors

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/6	Ford, J. January 15, 1979	Hampshire Imports, Inc.	76-1-00148	Item 737.20 17.5%	Item 772.95 12.5%	Agreed statement of facts	New York Dancing snowmen; plastic Christmas tree ornament
P79/7	Ford, J. January 15, 1979	Norman G. Jensen, Inc.	74-10-02767, etc.	Item 692.35 6.5% or 5.5% Item 948.00 10% (Pres. Proc. 4074)	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	International Falls-Ranier and Grand Portage (Duluth) Skidder tractors
P79/8	Ford, J. January 15, 1979	Leonard Sats, a/c Newport of Japan Radio Corp.	77-12-04832	Item 724.45 6%	Item A724.45 Free of duty pursuant to Generalized System of Preferences, Ex. Order No. 11888 of 11-24-75	Agreed statement of facts	New York Cassette tapes
P79/9	Ford, J. January 16, 1979	F. W. Myers & Co., Inc.	76-12-02690	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Detroit Skidder tractors
P79/10	Ford, J. January 16, 1979	Nipkow & Kobelt, Inc.	77-8-01953	Item 948.00 10% additional duty pursuant to Pres. Proc. 4074	Merchandise exempt from assessment of supplemental duties under item 948.00, pursuant to Treas. Dept. Order No. 4, T.D. 72-59	Agreed statement of facts	New York Woven fabrics of man-made fiber

					Order No. 4, T.D. 72-59		
P79/11	Ford, J. January 16, 1979	WMF of America, Inc.	76-4-00001	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks
P79/12	Ford, J. January 18, 1979	Bombardier, Ltd.	76-11-02499	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Port Huron (Detroit) Skidder tractors
P79/13	Ford, J. January 18, 1979	Gimbels Brothers, Inc.	77-12-04930	Item 791.15 10%	Item 791.75 6%	Agreed statement of facts	New York Shearing sheepskin coats
P79/14	Ford, J. January 18, 1979	Sunset East Corporation	77-12-04999	Item 700.60 20%	Item 700.55 or 700.58 6%	Agreed statement of facts	Los Angeles Footwear
P79/15	Watson, J. January 18, 1979	Joseph Markovits, Inc.	70/50093	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278)	New York Artificial flowers, etc.
P79/16	Richardson, J. January 25, 1979	F. W. Myers & Co., Inc.	72-10-02151	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit Iron powders (Atomet 25, 29, etc.)
P79/17	Richardson, J. January 25, 1979	F. W. Myers & Co., Inc.	72-10-02152	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit Iron powders (Atomet 25, 29, etc.)
P79/18	Richardson, J. January 25, 1979	F. W. Myers & Co., Inc.	72-12-02513	Item 608.05 0.3¢ per lb.	Item 608.02 25¢ per ton (1970); duty free (1972)	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit Iron powders (Atomet 25, 29 etc.)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/19	Ford, J. January 29, 1979	India Nepal, Inc.	78-9-01658	Item 740.38 27.5% Item 635.35 5% Item 222.44 8.5%	Error made in liquidating entry K248845; merchandise invoiced as copper pendant, brass collar, wood bracelets and wood collars, denim pendant, earring wire wrapped is properly eligible for duty free treatment under items A740.38, A653.35 and A222.44, TSUS, under the Generalized System of Preferences	Consent judgment	New York Copper pendant, brass collar, etc.
P79/20	Richardson, J. January 29, 1979	Bombardier, Ltd.	77-3-00423	Item 692.16 5%	Item 692.30 Free of duty	F. W. Myers & Company, Inc. v. U.S. (C.D. 4256, aff'd C.A.D. 1097)	Champlain-Rouses Point (Ogdensburg) Bombardier Muskeg Tractors
P79/21	Ford, J.	Bombardier, Ltd.	75-1-00087	Item 692.35	Item 692.30	U.S. v. Norman G. Jensen,	

P79/21	Ford, J. January 31, 1979	Bombardier, Ltd.	75-1-00087	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Buffalo-Niagara Falls (Buffalo) Skidder tractors
P79/22	Watson, J. January 31, 1979	Mountain Products Corp.	75-3-00759, etc.	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Seattle Backpacking tents
P79/23	Boe, J. January 31, 1979	United China & Glass Co.	70/44197, etc.	Item 544.51 26.5% or 23.5%	Item 688.40 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Make-up mirror with lights
P79/24	Ford, J. February 6, 1979	Import Specialists, Inc.	76-8-01903	Item 222.40 25%	Item 222.60 12.5%	Judgment on the pleadings	Longview (Portland, Oreg.) No. R-643 Wall Rack and No. R-591 Wall All
P79/25	Watson, J. February 8, 1979	Mobay Chemical Corp.	75-6-01468	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400, etc.
P79/26	Watson, J. February 8, 1979	Mobay Chemical Corp.	75-9-02481	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	San Francisco Desmocoll 400
P79/27	Landis, J. February 15, 1979	Kufner Textile Corp.	75-2-00440, etc.	Item 332.10 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Greenville-Spartanburg (Charleston) Cotton woven fabrics
P79/28	Boe, J. February 15, 1979	Del Mar Shipping Corp. et al.	71-8-00671, etc.	Item 544.51 23.5% or 20.5%	Item 688.40 8% or 6.5%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Los Angeles Make-up mirror with lights
P79/29	Boe, J. February 15, 1979	United Silver & Cutlery Co.	69/37615, etc.	Item 544.51 29.5% or 26.5%	Item 688.40 10% or 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Los Angeles Make-up mirror with lights

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/30	Ford, J. February 27, 1979	John V. Carr & Son, Inc.	77-1-00072	Items 807.00/ 692.35 5.5% (items marked "A" and "B")	Item 692.30 Free of duty (items marked "A") Item 692.03 Free of duty (items marked "B")	Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183) (items marked "A") Agreed statement of facts (items marked "B")	Buffalo-Niagara Falls (Buffalo) Log skidders (items marked "A") and Timberjack Forwarders (items marked "B") imported from Canada, incorporating certain parts of U.S. manufacture assembled in Canada
P79/31	Watson, J. February 27, 1979	J. Gerber & Co., Inc.	77-7-01308	Item 389.60 25¢ per lb. +15%	Item 642.97 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	New York Chenille pipe cleaners
P79/32	Watson, J. February 27, 1979	Kiffe Sales Products Co.	77-8-01706	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York 3-man nylon backpacking tents
P79/33	Richardson, J. March 6, 1979	John V. Carr & Son, Inc.	75-1-00076, etc.	Item 608.05 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons, Inc. v. U.S. (C.D. 2284); U.S. Customs Service ruling letter of 12/22/75	Port Huron (Detroit) Iron powder (MP61 produced by Domtar, Ltd.), covered by ruling letter of 12/22/75
P79/34	Richardson, J. March 6, 1979	John V. Carr & Son, Inc.	77-2-00242	Item 608.05 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons, Inc. v. U.S. (C.D. 2284); U.S. Customs Service ruling letter of 12/22/75	Detroit Iron powder (MP61 produced by Domtar, Ltd.), covered by ruling letter of 12/22/75

P79/35	Richardson, J. March 6,1979	F. W. Myers & Co., Inc.	74-7-01812	Item 608.08 9.5%	Item 608.04 0.31¢ per ton plus additional duties	John V. Carr & Sons, Inc. v. U.S. (C.D. 2384)	Champlain-Rouses Point (Ogdensburg) Iron powder (MP52)
P79/36	Richardson, J. March 6, 1979	C. J. Tower & Sons of Buffalo, Inc.	75-1-00074	Item 608.08 9.5%	Item 608.04 0.31¢ per ton plus additional duties	John V. Carr & Sons, Inc. v. U.S. (C.D. 2384)	Buffalo-Niagara Falls (Buffalo) Iron powder (MP52)
P79/37	Richardson, J. March 6, 1979	C. J. Tower & Sons of Buffalo, Inc.	75-1-00075	Item 608.05 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons, Inc. v. U.S. (C.D. 2384); U.S. Customs Service ruling letter of 12/22/75	Buffalo-Niagara Falls (Buffalo) Iron powders (MP32 and MP61 produced by Domtar, Ltd.), covered by ruling letter of 12/22/75
P79/38	Richardson, J. March 7, 1979	F. W. Myers & Co., Inc.	75-8-02607	Item 608.05 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons, Inc. v. U.S. (C.D. 2384); U.S. Customs Service ruling letter of 12/22/75	Champlain-Rouses Point (Ogdensburg) Iron powder (MP61 produced by Domtar, Ltd.), covered by ruling letter of 12/22/75
P79/39	Landis, J. March 7, 1979	C. H. Powell Company	76-9-01980	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/40	Landis, J. March 7, 1979	C. H. Powell Company	76-12-02797	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/41	Landis, J. March 7, 1979	C. H. Powell Company	77-1-00120	Item 332.40 5%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/42	Boe, J. March 7, 1979	William R. Marshall, for the Account of Clairol, Inc.	75-1-00333	Item 544.51 20.5% upon full value of merchandise	Items 688.40/807.00 6.5% upon full value of imported articles, less cost or value ($1.38605 each) of prefabricated U.S. manufactured components contained in model [C]LM3 imported in 1971	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New Haven (Bridgeport) American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (model [C]LM3)
P79/43	Landis, J. March 8, 1979	C. H. Powell Company	75-1-00164	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/44	Landis, J. March 8, 1979	C. H. Powell Company	76-5-01215	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/45	Landis, J. March 8, 1979	C. H. Powell Company	77-1-00121	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/46	Landis, J. March 8, 1979	C. H. Powell Company	77-6-01000	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/47	Watson, J. March 8, 1979	Naftone, Inc., et al.	70/7145, etc.	Item 405.25 16% + 2.5¢ per lb.; 14%+2.2¢ per lb.; 12.5%+1.9¢ per lb.;	Item 404.60 4%, 3% or 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1165)	New York Desmocoll 400, etc.

P79/47	Watson, J. March 8, 1979	Nuttone, Inc., et al.	70/7145, etc.	16% + 2.5¢ per lb.; 14%+2.2¢ per lb.; 12.5%+ 1.9¢ per lb.; 10.5%+1.6¢ per lb.; 9%+ 1.4¢ per lb.	4%, 3% or 2.5%	4578, aff'd C.A.D. 1166)	Desmocoll 400, etc.
P79/48	Ford, J. March 13, 1979	Eaton Corporation	78-9-01651	Items 807.00/ 692.35 5.5%	Item 692.30 Duty free	Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Buffalo Log skidders imported from Canada incorporating certain parts of U.S. manufacture assembled in Canada
P79/49	Landis, J. March 13, 1979	Bruce Duncan Co., Inc.	73-8-02402, etc.	Item 332.10 15% or 18% (items marked "A") Item 332.40 15% or 16% (items marked "A") Items 326.10, 326.11, 326.12, 326.19 9.5%, 9.51%, 9.7%, 9.89%, 10.08%, 10.29% or 11.22% (items marked "A") Item 320.20 9.51% (items marked "A") Item 322.40 16% (items marked "A") Item 338.30 22.5% + 13¢ per lb.; 22.5% + 15¢ per lb. (items marked "B")	Item 355.65 8.5 % or 9% (items marked "A") Item 355.82 18% + 15¢ per lb.; 15% + 12.5¢ per lb. (items marked "B")	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736) (items marked "A" and "B")	Chicago Cotton woven fabrics (items marked "A"); woven fabrics of man-made fibers (items marked "B")

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/50	Landis, J. March 13, 1979	C. H. Powell Company	75-10-02686	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/51	Landis, J. March 13, 1979	C. H. Powell Company	75-12-03067	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc., v. U.S. (C.D. 4736)	Boston Cotton woven fabrics coated with polyamide dots
P79/52	Watson, J. March 21, 1979	B.P.M. International Ltd.	76-3-00627	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Combination article which contains a tape player as an important element
P79/53	Watson, J. March 21, 1979	Kalmar Trading Co.	76-10-02357	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Backpacking tents
P79/54	Ford, J. March 22, 1979	Lingl Corporation et al.	76-4-01031, etc.	Item 531.37 22.5% (items marked "A" and "B")	Item 532.11 Free of duty (items marked "A") Item 531.27 Free of duty (items marked "B")	Agreed statement of facts	Norfolk Firebricks, type A111X (items marked "A") and type A0X (items marked "B")
P79/55	Watson, J. March 22, 1979	Naftone, Inc.	72-6-01290	Item 405.25 12.5% + 1.9¢ per lb.; 10.5% + 1.6¢ per lb.	Item 494.60 3%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400, etc. (hydroxylated polyurethane products)
P79/56	Newman, J. March 22, 1979	Wacker Chemical Corp.	77-3-00525, etc.	Item 658.00 9%	Item 632.43 5%	Wacker Chemical Corporation v. U.S. (C.D. 4605)	New York Rods (hyper-pure silicon)
P79/57	Landis, J.	Bruce Duncan Co., Inc.	73-6-02407,	Item 332.10	Item 355.65	Bruce Duncan Co., Inc. v.	

P79/57	Landis, J. March 26, 1979	Bruce Duncan Co., Inc.	73-6-02407, etc.	Item 332.10 15% or 18% (items marked "A") Item 332.40 15% (items marked "A") Items 326.10, 326.11, 326.12, 326.16, 326.22 7.99%; 7.99%+1.9%; 9.89%; 9.89%+1.9¢ per lb.; 10%; 10.08%; 10.20%; or 10.65% (items marked "A") Item 320.20 9.51% (items marked "A") Item 328.12 13.29% (items marked "A") Item 338.30 22.5%+15¢ per lb. (items marked "B")	Item 355.65 8.5% or 9% (items marked "A") Item 355.82 18%+15¢ per lb. (items marked "B")	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736) (items marked "A" "B")	Chicago Cotton woven fabrics (items marked "A"); woven fabrics of man-made fibers (items marked "B")
P79/58	Landis, J. April 3, 1979	C. H. Powell Company	74-7-01922	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/59	Ford, J. April 5, 1979	Durham Industries, Inc.	75-6-01624	Item 700.60 20%	Item 700.55 6%	Judgment on the pleadings	Los Angeles P.V.C. Swedish Clogs (#1646)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P70/60	Watson, J. April 5, 1979	Seaway Importing Co.	76-11-02547	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4643)	San Francisco Backpacking tents
P70/61	Ford, J. April 13, 1979	Norman G. Jensen, Inc.	76-3-00550	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Noyes (Pembina) Skidder tractors
P70/62	Boe, J. April 13, 1979	John S. Connor, Inc., for the account of Clairol, Inc.	75-2-00407	Item 544.51/807.00 20.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components Item 544.51 20.5% upon full value of merchandise	Items 688.40/ 807.00 6.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in model [C]LM2 which were found applicable upon liquidation of the merchandise; upon full value of imported merchandise less cost or value ($1.45224	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Baltimore Electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2 and LM1)

each) of pre-

					each) of prefabricated U.S. manufactured components contained in model LM1 imported in 1971		
P79/63	Landis, J. April 20, 1979	C. H. Powell Company	73-11-03129	Item 332.40 15% or 16%	Item 355.65 8.5% or 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/64	Watson, J. April 20, 1979	C&H Company et al.	76-3-00884 etc.	Item 389.60 25¢per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Seattle Backpacking tents
P79/65	Boe, J, April 20, 1979	Clairol, Inc.	76-6-01387	Items 544.51/ 807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C] LM2 and [C]LM3 which were found applicable upon liquidation of merchandise; and	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, [C]LM3, and LM4)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
					upon full value of imported merchandise less cost or value (§2.-02357) of prefabricated U.S. manufactured components contained in model LM4 imported in 1972 which were found applicable upon liquidation of merchandise. Value of LM4 upon liquidation was found to be $11.61 including cost or value of $2.02357		
P70/66	Boe, J. April 20, 1979	Export Import Services, Inc., for the account of Clairol, Inc., et al.	75-1-00332, etc.	Items 544.51/807.00 20.5% or 17.5% upon full value of merchandise less cost or value	Items 688.40/807.00 6.5% or 5.5% upon full value of imported merchandise, less	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models LM1,

						[C]LM2, [C]LM3, LM4 and LM5)
			of prefabricated U.S. manufactured components Item 544.51 20.5% or 17.5% upon full value of merchandise	cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3 (except entries K258614 and K258617 of 75-1-00332; 75-9-03076; and 75-4-01018) and LM5 which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise less cost or value ($1.45224 and $2.02357 each, respectively) prefabricated U.S. manufactured components contained in models LM1 and [C]LM3 (included in entries	

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
					K253614 and K253617 of 75-1-00332; 75-8-02076; and 75-8-01918) imported in 1972		
P79/67	Boe, J. April 20, 1979	Export Import Services, Inc., for the account of Clairol, Inc.	77-9-03887	Items 544.51/ 807.00 20.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components Item 544.51 20.5% upon full value of merchandise	Items 688.40/ 807.00 6.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in model [C] LM2 which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise less cost or value	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, [ights and other features (models [C]LM2 and C]LM3

P79/68	Boe, J. April 23, 1979	Clairol, Inc.	75-9-02303, etc.	Items 544.51/ 807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components Item 544.51 17.5% upon full value of merchandise	Items 688.40/ 807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, and LM4 (except those in 75-9-02166 and 75-10-02290) which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, and LM4 (except those in 75-9-02166 and 75-10-02290) which were found applicable upon reliquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, [C]LM3, and LM4)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/68					ported merchandise less cost or value ($2.3754 each) of prefabricated U.S. manufactured components contained in model LM4 (included in 75-9-02496 and 75-10-02506) imported in 1972		
P79/69	Boe, J. April 23, 1979	Export Import Services, Inc., for the account of Clairol, Inc.	77-2-00186, etc.	Items 544.51/ 807.00 20.5% or 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 6.5% or 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3,	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, [C]LM3, LM4, and [C]LM5)

					LM4, and [C]LM5 which were found applicable upon liquidation of merchandise		
P79/70	Landis, J. May 7, 1979	A. N. Deringer, Inc.	74-7-01809, etc.	Item 608.08 11% or 9.5% (MP32) Item 608.08 9.5% (one entry of MP32) Item 608.05 0.3¢ per lb. (MP32, MP40, MP61 and MP62)	Item 608.04 0.37¢ or 0.31¢ per ton plus additional duties (MP32) Item 608.02 Duty free (MP32, MP40, MP61 and MP62)	John V. Carr & Sons, Inc. v. U.S. (C.D. 2384); U.S. Customs Service ruling letter of 12-22-75	Champlain—Rouses Point (Ogdensburg) Iron powders (MP32 produced by Domtar, Ltd.; MP32, MP40, MP61 and MP62 produced by Domtar, Ltd. covered by ruling letter of 12-22-75)
P79/71	Landis, J. May 7, 1979	Sanyo Electric Inc.	78-11-02030	Item 720.42 12.5%	Item 720.02 37¢ each	Agreed statement of facts	Los Angeles Clock movements without dials or hands, less than 1.77 inches in width, etc.
P79/72	Watson, J. May 8, 1979	Seaway Importing Co.	74-11-03032, etc.	Item 389.60 25¢ per lb. +27%, 24%, 21%, 18% or 15%	Item 735.20 18%, 16%, 14%, 12% or 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Backpacking tents
P79/73	Boe, J. May 8, 1979	United China & Glass Co.	69/38859, etc.	Item 544.51 26.5%	Item 668.40 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Makeup mirror with lights which does not have a molded plastic case or container, but has a detachable plastic carrying case

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/74	Watson, J. May 9, 1979	Clairol, Inc.	75-7-01877	Items 544.51/807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2 and [C]LM5 which were found applicable upon liquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2 and [C]LM5)
P79/75	Watson, J. May 9, 1979	Naftone Inc. Mobay Chemical Co.	75-5-01311	Item 406.25 14%+2.2¢ per lb.; 12.5%+ 1.9¢ per lb.; or 10.5%+ 1.6¢ per lb.	Item 494.60 4%, 3% or 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400, etc.; hydroxylated polyurethane products
P79/76	Boe, J. May 9, 1979	Export Import Services, Inc. for the account of Clairol, Inc., et al.	75-1-00331, etc.	Items 544.51/807.00 20.5% or 17.5% upon full value of merchandise,	Items 688.40/807.00 6.5% or 5.5% upon full value of imported	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other

				of merchandise, less cost or value of prefabricated U.S. manufactured components	of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, LM4, and LM5 which were found applicable upon liquidation of merchandise		mirrors, lights and other features (models [C]LM2, [C]LM3, LM4, and LM5)
P79/77	Boe, J. May 9, 1979	United China & Glass Co.	74-2-00358, etc.	Item 544.51 23.5% or 17.5%	Item 688.40 8% (entry 107283); 5.5% (entries 113807 and 113311)	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Philadelphia Makeup mirror with lights which does not have a molded plastic case or container, but has a detachable plastic carrying case
P79/78	Watson, J. May 10, 1979	International Paint Co. (California), Inc.	67/10151, etc.	Item 409.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%	Item 405.15 3.5¢ per lb. + 25%; 3¢ per lb. + 22.5%	Agreed statement of facts	New York Antifouling Paste Paint H134; "pesticides"
P79/79	Boe, J. May 10, 1979	Clairol, Inc.	76-4-01005	Items 544.51/ 807.00 20.5% or 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 6.5% or 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York Electrical makeup appliances incorporating mirrors, lights and other features (models LM1, [C]LM2, [C]LM3, LM4 and [C]LM5)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/79				Item 544.51 20.5% or 17.5% upon full value of merchandise	components contained in models [C]LM2, [C]LM3 (except entries 194532, 225862, K256833, K253611, K253731, K253612 and K240588), and [C]LM5, which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise less cost or value ($1.48224, $1.39805, $2.3754 and $1.38605 each, respectively) of prefabricated U.S. manufactured components contained in models LM[illegible]		
					and [C]LM3		

					manufactured components contained in models LM1		
					and [C]LM3 imported in 1971 and LM4 and [C]LM3 imported in 1972 (included in entries 194532, 225862, K256833, K253611, K253731, K253612 and K240588)		
P79/80	Ford, J. May 15, 1979	John V. Carr & Son, Inc.	77-7-01250	Items 907.00/ 692.35 5.5%	Item 692.30 Free of duty	Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Buffalo Log skidders imported from Canada, incorporating certain parts of U.S. manufacture assembled in Canada
P79/81	Watson, J. May 15, 1979	Morsan, Inc.	74-3-00434	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York Backpacking tents
P79/82	Newman, J. May 17, 1979	Janex Corp.	77-11-04743, etc.	Item 737.20 17.5%	Item 688.40 5.5%	Janex Corp. v. U.S. (C.D. 4748)	New York Raggedy Ann Nite Timers and Raggedy Andy Nite Timers
P79/83	Landis, J. May 17, 1979	Rohner Gehrig & Co., Inc. Opti-Ray Inc.	78-3-00394	Item 708.45 15%	Item A708.45 Free of duty	Agreed statement of facts	New York Sunglasses
P79/84	Maletz, J. May 17, 1979	Hermann Ludwig, Inc.	78-4-00571	Item 772.51 4% (tires) Item 772.60 5% (tubes)	Item A772.51 Free of duty (tires) Item A772.60 Free of duty (tubes)	Agreed statement of facts	New York Wheelbarrow rib tread pneumatic tires and tubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/85	Maletz, J. May 25, 1979	Adolco Trading Corp.	77-7-01201	Item 948.00 10% additional duty pursuant to Pres. Proc. 4074	Merchandise exempt from assessment of supplemental duty under item 948.00, pursuant to Treas. Dept. Order No. 3, T.D. 71-222	Agreed statement of facts	New York Supplemental duty
P79/86	Boe, J. May 25, 1979	John S. Connor, Inc. for the account of Clairol, Inc.	77-2-00221, etc.	Items 544.51/807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components Item 544.51 17.5% upon full value of merchandise	Items 688.40/807.00 5.5% upon full value of imported merchandise less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, and [C]LM5 which were found applicable upon liquidation of merchandise;	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Baltimore American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, [C]LM3, [C]LM5, LM1 and LM6).

P79/87	Boe, J. May 25, 1979	EM Laboratories, Inc.	79-10-01884	Item 547.55 21%	Item 711.88 11%	and upon full value of imported merchandise less cost or value ($1.45224 and $1.86147 each, respectively) of jewfabricated U.S. manufactured components contained in models LM1 and LM6 imported in 1972	E. M. Laboratories, Inc. v. U.S. (C.D. 4744)	New York Thin layer chromatography plates

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/88	Watson, J. June 8, 1979	S. S. Kresge Co.	77-3-00485	Item 380.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Longview (Portland, Oreg.) Backpackers' tents
P79/89	Maletz, J. June 8, 1979	F. W. Woolworth Co.	77-3-00407	Item 737.90 17.5%	Item 735.20 10%	Agreed statement of facts	New York Ring toss game
P79/90	Maletz, J. June 8, 1979	Shayne Knitwear, Inc.	77-1-00107	Item 382.33 16.5% (jackets (blouses), pants and skirts) Item 328.81 25¢ per lb. + 27.5% (shirts)	Item 382.33 16.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three or four piece sets: jackets (blouses), pants, skirts and shirts; jackets (blouses), skirts and shirts; entireties
P79/91	Boe, J. June 8, 1979	Sanyo Electric Inc.	73-4-01083	Item 544.41 26.5% or 23.5%	Item 688.40 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York Beauty Vanity, 117 Volt, 60 cycles; electrical article
P79/92	Maletz, J. June 14, 1979	Creative Playthings, Division of Columbia Broadcasting System, Inc.	75-7-01859, etc.	Item 737.90 17.5%	Item 737.55 10.5%	Creative Playthings, Division of Columbia Broadcasting System, Inc. v. U.S. (C.D. 4754)	New York Toy cloth blocks or toy cloth bricks

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/93	Maletz, J. June 14, 1979	A. N. Deringer, Inc.	75-7-01879, etc.	Item 608.05 0.3¢ per lb. Item 608.08 9.5% Item 608.10 0.3¢ per lb.	Item 608.02 Duty free	John V. Carr & Sons Inc. v. U.S. (C.D. 2384); U.S. Customs Service ruling letter of 12/22/75	Alexandria Bay Iron powder (MP32 produced by Domtar, Ltd.) covered by ruling letter of 12/22/75
P79/94	Maletz, J. June 14, 1979	Shayne Knitwear, Inc.	75-7-01893	Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 382.54 37.5¢ per lb. + 30% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three piece suits (jackets, blouses and pants); entireties
P79/95	Landis, J. June 19, 1979	Abbey Rents	78-5-00907, etc.	Item 727.55 10% (items "A" and "B")	Item 692.10 3% (items marked "A") Item 692.27 4% (items marked "B")	Abbey Rents v. U.S. (C.D. 4720, aff'd C.A.D. 1213)	Los Angeles Electric wheelchairs (items marked "A"); parts of electric wheelchairs (items marked "B")
P79/96	Landis, J. June 19, 1979	Border Brokerage Co., Inc.	73-1-00048	Item 685.90 14%	Item 518.44 0.15¢ per lb.	Border Brokerage Co., Inc. v. U.S. (C.D. 4014)	Blaine (Seattle) Chutes, phase barriers, and hoods; articles made of a material known as asbestos cement board

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P79/97	Maletz, J. June 19, 1979	R. W. Smith & Co., Inc., a/c Poco Graphite, Inc. Poco Graphite, Inc.	73-12-03522, etc.	Item 517.91 9% or 7.5%	Item 517.11 3% or 2.5%	Agreed statement of facts	Houston Artificial graphite (grades A-300, A-210, A-250 and A-250Y)
P79/98	Newman, J. June 19, 1979	Hancock Gross, Inc	73-3-00664, etc.	Item 657.20 9.5% (items marked "A") Item 657.80 11% (items marked "B")	Item 653.95 8.5% (items marked "A") Item 654.20 10% (items marked "B")	Hancock Gross, Inc. v. U.S. (C.D. 4662) (items marked "A") Agreed statement of facts (items marked "B")	Philadelphia Strainer bodies in c.v. of steel not coated or plated with precious metal (items marked "A") "Snap-on" type couplings and hose "Y" connections in c.v. of zinc not coated or plated with precious metal (items marked "B")
P79/99	Landis, J. June 20, 1979	Abbey Rents	79-1-00002	Item 727.55 10% (items marked "A" and "B")	Item 692.10 3% (items marked "A") Item 692.27 4% (items marked "B")	Abbey Rents v. U.S. (C.D. 4720, aff'd C.A.D. 1213)	Los Angeles Electric wheelchairs (items marked "A"); parts of electric wheelchairs (items marked "B")
P79/100	Boe, J. June 20, 1979	F. W. Myers & Co., Inc.	77-5-00788	Item 945.69 25%	Item 692.27 4%	Agreed statement of facts	Detroit Automobile trailers imported from Canada, pulled by automobile truck-tractors of American origin; truck-tractors not treated as dutiable merchandise
P79/101	Ford, J. June 27, 1979	F. W. Myers & Co., Inc.	74-9-02640	Item 692.35 5.5%	Item 692.30 Free of duty	F. W. Myers & Company, Inc. v. U.S. (C.D. 4256, aff'd C.A.D. 1007) Norman G. Jensen, Inc. v. U.S. (C.D. 4634, aff'd C.A.D. 1183)	Champlain-Rouses Point (Ogdensburg); Port Huron (Detroit): Detroit Bombardier Muskeg Tractors, Carriers and Jimmy Skidders

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/102	Landis, J. June 27, 1979	Abbey Rents	76-8-01911, etc.	Item 727.55 10% (items marked "A" and "B")	Item 692.10 3% (items marked "A") Item 692.27 4% (items marked "B")	Abbey Rents v. U.S. (C.D. 4720, aff'd C.A.D. 1213)	Los Angeles Electric wheelchairs (items marked "A"); parts of electric wheelchairs (items marked "B")
P79/103	Landis, J. June 27, 1979	Intercontinental Air Freight, Inc.	74-9-02451	Item 332.40 16%	Item 355.65 9%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/104	Landis, J. June 27, 1979	C. H. Powell Company	74-5-01259	Item 332.40 16% or 15%	Item 355.65 9% or 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/105	Maletz, J. June 27, 1979	I've Got Class, et al.	75-11-02919, etc.	Item 382.78 25¢ per lb. + 32.5%	Item 382.33 16.5% Polyester knit blouses dutiable as entireties with tops and pants with which imported on basis of export value; said value is invoice unit price less appropriate quota charges	J. C. Penny Purchasing Corporation v. U.S. (C.D. 4671)	New York Polyester blouses; pants of ladies' 3-piece suits; entireties

P79/106	Maletz, J. June 27, 1979	Shayne Knitwear, Inc.	75-9-02417, etc.	Item 382.54 37.5¢ per lb. + 30% (blouses and pants) Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies' 3-piece suits (jackets, blouses and pants); entireties
P79/107	Newman, J. June 27, 1979	Delmonico International Corp., d/o Elgin National Ind.	74-1-00160	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Elgin Brand Stereo Radio Receivers with 8-Track Tape Players (Model RM4390)
P79/108	Newman, J. June 27, 1979	J.V.C. America, Inc.	73-8-02335	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Elgin Brand Stereo Radio Receivers with 8-Track Tape Players (Model RM4382)
P79/109	Boe, J. June 27, 1979	Importers Associates, Inc.	73-12-03476	Item 705.85 15%	Item 735.05 9%	Agreed statement of facts	New York Ski mittens or gloves (style Nos. 815 and 615)
P79/110	Re, C.J. June 29, 1979	Hatch Imports, Inc.	75-6-01512, etc.	Item 705.35 15%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	Los Angeles Gloves for use in sport of motocross racing
P79/111	Watson, J. June 29, 1979	M. Adler's Son Inc.	72-4-00642, etc.	Item 748.20 28%, 26.5%, 25%, 23.5%, 22% or 21%	Item 774.60 17%, 15%, 13.5%, 11.5%, 10% or 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial flowers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/112	Boe, J. June 29, 1979	International Mercantile Corp.	70/42419, etc.	Item 544.51 23.5%	Item 688.40 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego Make-up mirrors with lights (models SM/2 and HA/4)
P79/113	Boe, J. June 29, 1979	Korvettes, Inc.	77-7-01309	Items 651.75/ 949.06 2¢ each + 45% (186,096 pieces of flatware)	Items 651.75/ 949.00 1¢ each + 12.5% (102,221 pieces of flatware, with proportionate value of $9,842, within tariff-rate quota)	Agreed statement of facts	New York Sets of knives and forks totaling 186,096 pieces of flatware; 102,221 pieces within aggregate quantities provided for single units produced in Japan and entered in calendar quarter of 7/1/76
P79/114	Boe, J. June 29, 1979	New York Merchandise Co., Inc.	78-9-01554	Item 737.20 17.5%	Item 688.40 5.5%	Agreed statement of facts	San Diego Sexy Doll Radios
P79/115	Boe, J. June 29, 1979	New York Merchandise Co., Inc.	78-9-01557	Item 737.20 17.5%	Item 688.40 5.5%	Agreed statement of facts	Los Angeles Sexy Doll Radios

ABSTRACTS OF CUSTOMS COURT DECISIONS

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Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/1	Richardson, J. January 11, 1979	Jaymar Ruby, Inc.	72-4-00848, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Cotton Elastic Web", etc.
R79/2	Ford, J. January 18, 1979	International Seaway Trading Corp.	R60/12880, etc.	American selling price	$1.53 less 6%, per pair	Agreed statement of facts	New York Rubber clogs
R79/3	Ford, J. January 22, 1979	International Seaway Trading Corp.	R60/13716	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	New York Footwear
R79/4	Ford, J. January 22, 1979	International Seaway Trading Corp.	R60/13718	American selling price	$2.35 less 6% per pair; $2.45 less 6% per pair	Agreed statement of facts	New York Footwear
R79/5	Ford, J. January 22, 1979	International Seaway Trading Corp.	R60/14538, etc.	American selling price	$1.53 less 2% per pair	Agreed statement of facts	New York Rubber clogs
R79/6	Ford, J. January 22, 1979	International Seaway Trading Corp.	R61/1667	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	New York Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/7	Ford, J. January 22, 1979	Lasco Rubber Co.	R62/9421, etc.	American selling price	As set forth under column titled "Claimed Value Per Pair" on schedule A attached to decision and judgment	Agreed statement of facts	Baltimore Footwear
R79/8	Ford, J. January 22, 1979	Nomura Trading Corp.	R61/4980, etc.	American selling price	$1.72 less 6% per pair	Agreed statement of facts	Los Angeles Footwear
R79/9	Landis, J. January 22, 1979	Brown, Alcantar & Brown, Inc.	R70/9049	Constructed value	As set forth in schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	El Paso Phonograph records
R79/10	Richardson, J. January 25, 1979	National Silver Company	74-6-01425, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values (merchandise described on schedule A attached to decision and judgment) Appraised unit values less 7.5% thereof net packed (merchandise described on schedule B attache l to decision and judgment)	Agreed statement of facts	Los Angeles Stainless steel flatware
R79/11	Ford, J. January 29, 1979	International Seaway Trading Corp.	R61/3596	American selling price	$1.53 less 6%, per pair	Agreed statement of facts	New York Footwear
R79/12	Ford, J. January 29,	Skelton-Kohara & Co., a/c House of	78-5-00855	Export value	Invoice unit values, less airmail, sway, and	Judgment on the plead-	Honolulu

R79/12	Ford, J. January 29, 1979	Skelton-Kohara & Co., a/c House of Adler, Inc. and House of Adler, Inc.	78-5-00855	Export value	Invoice unit values, less airmail, assay, and insurance charges, net packed	Judgment on the pleadings	Honolulu Loose diamonds
R79/13	Richardson, J. January 29, 1979	Dixie Warehouse, Inc.	R62/3835	Cost of production	As specified in column titled "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R79/14	Richardson, J. January 29, 1979	Patrick & Graves	R65/13996	Cost of production	As specified in column titled "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R79/15	Richardson, J. January 29, 1979	Patrick & Graves	R65/23168	Cost of production	DM3363; DM3434.07; invoice unit value	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R79/16	Richardson, J. January 29, 1979	Patrick & Graves	R67/1343	Cost of production	DM3590.97; DM3666.55; DM4298	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R79/17	Ford, J. January 31, 1979	Brother International Corp.	R64/23323	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New Orleans Sewing machine heads
R79/18	Ford, J. January 31, 1979	Bus and Truck Supply Co.	73-2-00502	Export value	Appraised values shown in red ink on invoices, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/19	Ford, J. January 31, 1979	Consolidated Sewing Machine Corp.	R64/14653, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Miami Sewing machine heads
R79/20	Ford, J. January 31, 1979	Trans World Industries, Inc.	R63/11849, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Los Angeles Sewing machine heads
R79/21	Richardson, J. January 31, 1979	Bus and Truck Supply Co.	R66/23473	Constructed value	Amounts shown in column headed "Constructed Value" on schedule attached to decision and judgment, plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/22	Richardson, J.	B. Kuppenheimer &	R65/2504,	Constructed value	Appraised values less	H. M. Young Assn.	Chicago

R79/22	Richardson, J. January 31, 1979	B. Kuppenheimer & Co., Inc.	R65/2504, etc.	Constructed value	Appraised values less less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1128)	Chicago "Elastic fabric," "Elastic Webbing," etc.
R79/23	Newman, J. January 31, 1979	Ernest Lowenstein, Inc.	R66/7753	Export value	Invoiced unit prices less 2.845%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.
R79/24	Ford, J. February 6, 1979	Consolidated Sewing Mschine Corp.	R59/17828, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R79/25	Re, C.J. February 26, 1979	Pan Pacific Overseas Corp. et. al.	R59/13202, etc.	Export value	Net appraised value less 7½%, net packed	U.S. v. Getz Bros. & Co. et al (C.A.D. 927)	Longview (Portland, Oreg.) Japanese plywood
R79/26	Richardson, J. February 26, 1979	William A. Mc Ginty, a/c Jaymar Ruby, Inc.	R67/1315, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1128)	Chicago "Elastic fabric," etc.
R79/27	Richardson, J. March 7, 1979	Nordby Supply Co.	76-12-02691	Antidumping duties	Merchandise not subject to antidumping duties; protest sustained; district director shall refund assessed antidumping duties	Judgment on the pleadings	Seattle Fish netting
R79/28	Richardson, J. March 7, 1979	Toyo Rug Co., Ltd.	R61/4347	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Oval tubing rugs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/29	Ford, J. March 21, 1979	Control Data Corporation	R67/6843, etc.	Constructed value	Per unit values set forth in schedule 2 attached to decision and judgment, which values include amounts eligible for allowance under item 807.00	Control Data Corporation v. U.S. (C.A.D. 1132)	Minneapolis Inner memory plane assemblies and outer memory plane assemblies
R79/30	Richardson, J. March 21, 1979	National Silver Co.	R62/14724	Export value (items described on schedules A and B attached to decision and judgment)	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values (schedule A items) Various appraised unit values less 7.5%, net packed (schedule B items)	Agreed statement of facts	San Diego Porcelainware sets, etc. (schedule A items); earthenware sets (schedule B items)
R79/31	Richardson, J. March 22, 1979	National Silver Co.	R62/11421, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
R79/32	Watson, J. March 22, 1979	Sandoz, Inc.	74-2-00390	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7%, 28.9% and 29.2% representing profit and general ex-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs			
R79/33	Ford, J. March 26, 1979	Consolidated Sewing Machine Corp.	R61/4207, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads	
R79/34	Ford, J. March 28, 1979	W. J. Byrnes & Co. et al.	R63/1139, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes	
R79/35	Ford, J. March 28, 1979	Curtis Mathes Mfg. Co.	R62/14757, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement o facts	Dallas (Houston) Electron receiving tubes	
R79/36	Ford, J. March 28, 1979	Fleetwood Industries, Inc.	R61/3950	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Charleston Sewing machine heads	

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/37	Ford, J. March 28, 1979	John L. Westland & Son, Inc., a/c Randa, Inc.	R63/7462	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Flatware
R79/38	Ford, J. March 29, 1979	Leading Forwarders, Inc., a/c General Instrument Corp.	R65/3873, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/39	Ford, J. March 29, 1979	RCA	R66/21346, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/40	Ford, J. March 29, 1979	The Specialty House	271622-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk and rayon scarfs
R79/41	Landis, J. March 29, 1979	RCA Victor Mexicana	R65/18165, etc.	Constructed value	As set forth in schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	Los Angeles Phonograph records
R79/42	Ford, J. April 3, 1979	Curtis Mathes Mfg. Co.	R64/21467, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Dallas (Houston) Electron receiving tubes
R79/43	Ford, J. April 4, 1979	Daystrom Inc. Intl. Sales et al.	R61/21865, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/44	Ford, J. April 4, 1979	International Expediters, Inc.	R65/7208, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/45	Ford, J. April 4, 1979	Kanematsu New York Inc.	R67/19370	Export value	$11.996 (radio and case)	Agreed statement of facts	New York Radios and cases

R79/45	Ford, J. April 4, 1979	Kanematsu New York Inc.	R67/19370	Export value	$11.006 (radio and case)	Agreed statement of facts	New York Radios and cases
R79/46	Ford, J. April 4, 1979	Master Craft Electronics Corp.	R69/1942	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Radios
R79/47	Ford, J. April 4, 1979	Trans World Shipping Corp.	R58/17977, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R79/48	Ford, J. April 5, 1979	Curtis Mathes Mfg. Co.	R63/6781, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Los Angeles Electron receiving tubes
R79/49	Watson, J. April 5, 1979	Sandor-Wander, Inc.	74-3-00779	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7%, 28.9%, 31.1% and 29.2% which represent profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/50	Watson, J. April 5, 1979	Sandoz-Wander, Inc.	76-3-00655, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipments to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/51	Boe, J. April 5, 1979	Export Import Services, Inc. for the Account of Clairol, Inc.	77-9-03888	Items 544.51/807.00 20.5% or 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM3 and LM4)

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				Item 544.51 20.5% or 17.5% upon full value of merchandise	models [C]LM3 (except entry 307139) and LM4 which		

				Item 544.51 20.5% or 17.5% upon full value of merchandise	models [C]LM3 (except entry 307130) and LM4 which were found applicable upon liquidation of the merchandise; and upon full value of imported merchandise, less cost or value ($1.-28005 each) of prefabricated U.S. manufactured components contained in model [C]LM3 included on entry 307130 imported in 1972			
R79/52	Ford, J. April 13, 1979	Curtis Mathes Mfg. Co.	R82/5332, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed facts	statement of	Los Angeles Electron receiving tubes
R79/53	Ford, J. April 13, 1979	National Silver Co.	R80/10943, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed facts	statement of	Los Angeles Flatware
R79/54	Landis, J. April 13, 1979	Bentley Fabrics Corp.	79-10-02300	Export value	120 BF per meter	Agreed facts	statement of	New York Cotton/rayon fabric, Las Vegas quality, color: 683
R79/55	Landis, J. April 13, 1979	Fermin R. Morales, a/c Curtis Mathes of Puerto Rico	R69/3071	United States value	F.o.b. unit invoice prices plus 50%	Agreed facts	statement of	San Juan Electron receiving tubes

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/56	Landis, J. April 13, 1979	Morse Sewing Machine	R61/18817, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads
R79/57	Landis, J. April 13, 1979	A. H. Myer & Co. et al.	R65/15869, etc.	Constructed value	As set forth in schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	San Francisco; Los Angeles Phonograph records
R79/58	Landis, J. April 13, 1979	Transworld Shipping	R66/1175, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machines
R79/59	Watson, J. April 20, 1979	Sandoz, Inc.	74-4-00858	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7%, 28.9% and 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; di-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R79/60	Landis, J. April 23, 1979	The Nissho American Corp.	R65/3564, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/61	Landis, J. April 23, 1979	RCA Victor Mexicana SA et al.	R65/15871, etc.	Constructed value	As set forth in schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	San Francisco Phonograph records
R79/62	Landis, J. April 23, 1979	Taub, Hummel & Schnall, Inc., et al.	R65/3454, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/63	Landis, J. May 7, 1979	National Silver Co.	R60/3074	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Flatware
R79/64	Landis, J. May 7, 1979	National Silver Co.	R61/1456	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
R79/65	Landis, J. May 8, 1979	National Silver Co.	R64/15275	Export value	F.o.b. invoice unit prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Porcelainware

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/66	Landis, J. May 8, 1979	New York Merchandise Co., Inc.	R60/14722, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
R79/67	Landis, J. May 8, 1979	Nozaki Associates, Inc.	R59/5132, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Canned tuna
R79/68	Landis, J. May 8, 1979	Randa, Inc.	R61/17042	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
R79/69	Landis, J. May 8, 1979	Trans World Industries, Inc.	R63/1340	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads
R79/70	Landis, J. May 8, 1979	United Silver & Cutlery Co.	R59/11147, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Flatware
R79/71	Landis, J. May 9, 1979	National Silver Co.	R63/3138, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference	Agreed statement of	Los Angeles

R79/71	Landis, J. May 9, 1979	National Silver Co.	R65/2128, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Chinaware
R79/72	Landis, J. May 9, 1979	Nichimen Co., Inc.	R65/671, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads
R79/73	Watson J. May 9, 1979	Sandor-Wander Inc.	75-7-01709	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% and 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class of kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer to allow for customs duties payable on the imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/74	Landis, J. May 10, 1979	Trans World Industries, Inc.	R69/11151, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New York Sewing machines
R79/75	Watson, J. May 10, 1979	Sandoz-Wander, Inc.	73-7-02057	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% and 20.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/76	Landis, J. May 15, 1979	International Expediters Inc.	R65/18358, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/77	Watson, J. May 15, 1979	Sandoz-Wander, Inc.	73-9-02643	United States value	U.S. selling prices, less 1% cash discount as	U.S. v. Geigy Chemical	New York

R79/77	Watson, J. May 15, 1979	Sandoz-Wander, Inc.	73-9-02643	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% and 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/78	Newman, J. May 15, 1979	Yoshida International, Inc.	71-8-00726	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts.	New York Zippers and/or zipper parts.
R79/79	Newman, J. May 16, 1979	Magnavox Company	R67/12594, etc.	Constructed value	Invoice unit values plus $.025 per unit for transportation of U.S. supplied components	Agreed statement of facts.	New York Phonograph record changers
R79/80	Maletz, J. May 17, 1979	International Expediters, Inc.	R63/473, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts.	Chicago Electron receiving tubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/81	Richardson, J. May 18, 1979	Magnavox Company	R70/2028, etc.	Constructed value	Invoice unit values plus $.025 per unit for transportation of U.S. supplied components	Agreed statement of facts.	New York Phonograph record changers
R79/82	Watson, J. May 18, 1979	Sandoz-Wander, Inc.	73-12-03555	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6%, 31.1% and 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/83	Watson, J. May 18, 1979	Sandoz-Wander, Inc.	74-6-00859	United States value	U.S. selling prices, less 1% cash discount as	U.S. v. Geigy Chemical	New York

R79/83	Watson, J. May 18, 1979	Sandoz-Wander, Inc.	74-6-00859	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% and 29.2%, representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.22 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/84	Maletz, J. May 23, 1979	Astra Trading Corp.	R59/17326, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R79/85	Maletz, J. May 23, 1979	J. E. Bernard & Co., Inc.	R65/7203, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/86	Maletz, J. May 23, 1979	National Silver Co.	R68/11188, etc.	Export value	Appraised value less 7.5% net packed	Agreed statement of facts	Los Angeles Stainless steel flatware

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/87	Boe, J. June 8, 1979	Conti Rubber Corp.	74-7-01785	Foreign value	Appropriate claimed unit values listed on schedule attached to decision and judgment	Agreed statement of facts	Savannah Automotive tires
R79/88	Boe, J. June 19, 1979	Bus and Truck Supply Co.	73-2-00469, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U S origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/89	Boe, J. June 19, 1979	Bus and Truck Supply Co.	75-6-01591	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U S origin allowed on liquidation	Agreed statement of facts	Galveston Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/90	Boe, J. June 20, 1979	Bus and Truck Supply Co.	73-2-00494, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/91	Boe, J. June 20, 1979	Bus and Truck Supply Co.	73-2-00498, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/92	Boe, J. June 20, 1979	Bus and Truck Supply Co.	73-2-00501, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/93	Boe, J. June 20, 1979	Rachelle Laboratories, Inc.	77-11-04639	American selling price	$200 per kilogram, net packed	Agreed statement of facts	Los Angeles Chlordiazepoxide

R79/94	Landis, J. June 2, 1979	Radio Corp. of America (RCA Victor Record Div.) etal.	R65-9456, etc.	Constructed value	As set forth on schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	Laredo Phonograph records
R79/95	Boe, J. June 27, 1979	Bus and Truck Supply Co. et al.	72-10-02122, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New York Inter-city passenger buses
R79/96	Boe, J. June 27, 1979	Bus and Truck Supply Co.	72-11-02444, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/97	Boe, J. June 27, 1979	Bus and Truck Supply Co.	72-11-02445, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF			PORT OF ENTRY

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/98	Boe, J. June 27, 1979	Bus and truck Supply Co.	73-2-00468, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/99	Boe, J. June 27, 1979	Bus and Truck Supply Co.	73-2-00467, etc.	Export value	Appraised values less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation.	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/100	Boe, J. June 27, 1979	Bus and Truck Supply Co.	73-2-00497, etc.	Export value	Appraised values, less 10% (excluding from the 10% deduction the value of any Michelin tires included in appraised values), less the value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/101	Boe, J. June 27, 1979	Bus and Truck Supply Co.	73-2-00512, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the	Agreed statement of facts	New Orleans Inter-city-passenger buses

					value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation		
R79/102	Boe, J. June 29, 1979	The Carborundum Company	76 1-00230	Constructed value	$141,759 as set forth on schedule A attached to decision and judgment	Agreed statement of facts	Buffalo-Niagara Falls (Buffalo) Unfinished grinding wheels
R79/103	Boe, J. June 29, 1979	Hallmark Cards, Incorporated	77-3-00465, etc.	Constructed value	Amount equal to invoice unit values which does not include an amount for copyright and trademark royalties to be paid by plaintiff to various licensors upon sale of merchandise in U.S.	Agreed statement of facts	Kansas City (St. Louis) Toys, candles, plastic jewelry, etc.
R79/104	Boe, J. June 29, 1979	J. R. McMullen Co. Inc.	77-5-00860	Export value	Merchandise entered on 5/24/74 (entry No. K342373), liquidated on 3/14/75, reliquidated on 12/19/75 with an increase of $435.60; reliquidation occurred more than 90 days after original liquidation, such reliquidation contrary to provisions of 19 U.S.C. § 1501; regional commissioner of customs ordered to reliquidate accordingly	Agree statement of facts	New York Wearing apparel

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